Supreme Court, U.S.
FILED
03-517 MAY - 4 2004
OFFICE OF THE CLERK

No. 03-

IN THE

Supreme Court of the United States

TIM SCARROT and ANDREW KOPONEN,

Petitioners,

v.

KELY WILKINS, Individually and as the Successor in Interest to Decedent William Alberto Wilkins; WILLIAM ALBERTO WILKINS, Individually; THE ESTATE OF WILLIAM WILKINS; WILLIAM RANDOLPH WILKINS, a minor, by and through his Guardian Ad Litem, Kely Wilkins; FERNANDO WILKINS, Individually; JOSEFINA WILKINS, Individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN A. RUSSO
RANDOLPH W. HALL
WILLIAM E. SIMMONS
City of Oakland
One Frank H. Ogawa Plaza
6th Floor
Oakland, CA 94612
(510) 239-3751

TODD BOLEY
Counsel of Record
HENRY S. HEWITT
MARK L. MOSLEY
ERICKSON, BEASLEY, HEWITT & WILSON LLP
483 Ninth Street, Suite 200
Oakland, CA 94607
(510) 839-3448

Counsel for Petitioners

187074

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

In an excessive force case involving the fatal shooting of an undercover police officer by two fellow officers, the court of appeals affirmed the denial of summary judgment on the issue of qualified immunity without determining, based on plaintiffs' version of the situation confronting the officers, whether the officers could have had an objectively reasonable belief that the force they used was necessary and lawful.

The questions presented are:

1. On a motion for summary judgment on the issue of qualified immunity in an excessive force case, is a court required to determine, after resolving all factual disputes in the plaintiffs' favor, whether a reasonable officer facing the same circumstances as the defendant officers could have believed that the actions taken by the defendants were lawful?

2. If the foregoing test is applied, are the officers entitled to qualified immunity from civil liability?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions Involved	1
Statement of the Case	2
A. Statement of Facts	2
B. Statement of the Case	6
Reasons for Granting the Petition	8
Conclusion	27

TABLE OF CITED AUTHORITIES

Page

Cases:

Allen v. Muskogee
119 F.3d 837 (10th Cir. 1997) 19

Altman v. City of High Point
330 F.3d 194 (4th Cir. 2003) 22

Anderson v. Creighton
483 U.S. 635, 107 S. Ct. 3034,
97 L. Ed. 2d 523 (1987) ..... *passim*

Anderson v. Russell
247 F.3d 125 (4th Cir. 2001) 22

Butz v. Economou
438 U.S. 478, 98 S. Ct. 2894,
57 L. Ed. 2d 895 (1978) 9

Carr v. Tatangelo
338 F.3d 1259 (11th Cir. 2003) 23

County of Sacramento v. Lewis
523 U.S. 833, 118 S. Ct. 1708,
140 L. Ed. 2d 1043 (1998) 24

Davis v. Scherer
468 U.S. 183, 104 S. Ct. 3012,
82 L. Ed. 2d 139 (1984) 17

Elliott v. Leavitt,
105 F.3d 174 (4th Cir. 1997) 16

Cited Authorities

Page

Elliott v. Leavitt
99 F.3d 640 (4th Cir. 1997) 26

Ensley v. Soper
142 F.3d 1402 (11th Cir. 1998) 24

Estep v. Dallas County
310 F.3d 353 (5th Cir. 2002) 21, 22

Gold v. City of Miami
121 F.3d 1442 (11th Cir. 1997) 20

Gomez v. Atkins
296 F.3d 253 (4th Cir. 2002) 21

Graham v. Connor
490 U.S. 386, 109 S. Ct. 1865,
104 L. Ed. 2d 443 (1989) 15, 19, 25

Harlow v. Fitzgerald
457 U.S. 800, 102 S. Ct. 2727,
73 L. Ed. 2d 396 (1982) 9, 17

Harris v. Roderick
126 F.3d 1189 (9th Cir. 1997) 23

Hegarty v. Somerset County
53 F.3d 1367 (1st Cir. 1995), *cert. den. sub. nom.*
Hegarty v. Wright, 516 U.S. 1029, 116 S. Ct. 675,
133 L. Ed. 2d 524 (1995) 20, 22

Cited Authorities

Page

Humphrey v. Staszak
148 F.3d 719 (7th Cir.1998) 20

Hunter v. Bryant
502 U.S. 224, 112 S. Ct. 534,
116 L. Ed. 2d 589 (1991) 9, 17

Johnson v. Jones
515 U.S. 304, 115 S. Ct. 2151,
132 L. Ed. 2d 238 (1995) 6

Jones v. Cannon
174 F.3d 1271 (11th Cir. 1999) 20

Kopec v. Tate
361 F.3d 772 (3d Cir. 2004) 18

Krueger v. Fuhr
991 F.2d 435 (8th Cir 1993), *cert. denied*,
510 U.S. 946, 126 L. Ed. 2d 335,
114 S. Ct. 386 (1993) 23

Kuha v. City of Minnetonka
328 F.3d 427 (8th Cir. 2002) 25

Lennon v. Miller
66 F.3d 416 (C.A.2 (N.Y.),1995) 21

Mace v. City of Palestine
333 F.3d 621 (5th Cir. 2003) 22

Cited Authorities

Page

Malley v. Briggs
475 U.S. 335, 106 S. Ct. 1092,
89 L. Ed. 2d 271 (1986) 9, 14, 17

Medina v. Cram
252 F.3d 1124 (10th Cir. 2001) 19

Mitchell v. Forsyth
472 U.S. 511, 105 S. Ct. 2806,
86 L. Ed. 2d 411 (1985) 9, 17

Montoute v. Carr
114 F.3d 181 (11th Cir.1997) 20

Moreland v. Las Vegas Metropolitan Police Department
159 F.3d 365 (9th Cir. 1998) 24

Olsen v. Layton Hills Mall
312 F.3d 1304 (10th Cir. 2002) 19

Payne v. Pauley
337 F.3d 767 (7th Cir. 2003) 21

Priester v. Riviera Beach
208 F.3d 919 (11th Cir. 2000) 16, 26

Provost v. City of Newburgh
262 F.3d 146 (2d Cir. 2001) 20

Cited Authorities

Page

Rivas v. City of Passaic
__ F.3d __, 2004 WL 877645 (3d Cir. 2004) 17, 18

Saucier v. Katz
533 U.S. 194 (2001) ..... *passim*

Scheuer v. Rhodes
416 U.S. 232, 94 S. Ct. 1683,
40 L. Ed. 2d 90 (1974) 26

Scott v. Clay County
205 F.3d 867 (6th Cir. 2000) 21

Scott v. Edinburg
346 F.3d 752 (7th Cir. 2003) 23

Tennessee v. Garner
471 U.S. 1, 105 S. Ct. 1694,
85 L. Ed. 2d 1 (1985) 23

Vaughan v. Cox
343 F.3d 1323 (11th Cir. 2003) 20, 23

Willingham v. Loughnan
321 F.3d 1299 (11th Cir. 2003) 23

Wilson v. City of Des Moines, Iowa
293 F.3d 447 (8th Cir. 2002) 19

Winfield v. Bass
106 F.3d 525 (4th Cir. 1997) 16, 25

Cited Authorities

Page

United States Constitution:

Fourth Amendment ..... *passim*

Statute:

28 U.S.C. § 1254(1) 1

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Argued And Submitted November 20, 2003 ..... 1a

Appendix B — Order Granting In Part And Denying In Part Defendants' Motion For Summary Judgment Dated And Filed December 17, 2002 ..... 14a

Appendix C — Order Of The United States Court Of Appeals For The Ninth Circuit Filed January 14, 2004 ..... 16a

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a.) is reported at 350 F.3d 949. The order of the district court (App., *infra*, 14a-15a) is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on November 20, 2003, and denied the appellants' petition for rehearing on January 14, 2004. (App., *infra*, 16a-17a) On April 6, 2004, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to May 4, 2004. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

STATEMENT OF THE CASE

Respondents brought this Fourth Amendment excessive force action on behalf of themselves and their decedent, Oakland police officer Willie Wilkins, after two other Oakland police officers mistook Wilkins for an armed criminal suspect and shot and killed him. Wilkins was in plain clothes at the time, working an undercover narcotics assignment. Petitioners Timothy Scarrott and Andrew Koponen are the two officers who shot Wilkins. In this petition, Officers Scarrott and Koponen challenge the lower courts' denial of summary judgment on their qualified immunity defense.

A. Statement of Facts

Most of the facts surrounding the shooting are not in dispute.[1] On January 11, 2001, Officers Scarrott and Koponen were in uniform on regular patrol in Oakland. A.E. 57:25-26; 111:26-112:1. At about 11:00 p.m., they answered a call to assist other officers in the pursuit of a car thief suspect about two miles away. A.E. 58:11-18; 112:6-12. The police dispatcher directed Scarrott and Koponen to a street intersection from which they were to help establish a "perimeter" by observing the area and preventing the escape of the suspect. A.E. 58:19-21, 58:27-28; 112:19.

As Scarrott and Koponen arrived at their assigned position, they saw two men who appeared to be coming out

1. Because this case arises on petitioners' motion for summary judgment, we present all disputed facts in the light most favorable to respondent. References to the record are from the Appellants' Excerpt of Record on Appeal ("A.E.")

of a driveway a half block away. A.E. 59:3-7. The two men were involved in an altercation. A.E. 59:5-11, 112:28-113:5. Neither man matched any of the varying descriptions of the suspect that had been given over the radio by the police dispatcher, A.E. 130:22-23, 131:6-7, 132:4-6, and neither Scarrott nor Koponen thought the two men were connected with the car theft incident. A.E. 58:10-11, 113:6-7. In fact, the two men were Officer Wilkins (in plain clothes) and Demetrius Phillips, the car theft suspect.

Officers Scarrott and Koponen brought their patrol car to a stop directly opposite the sidewalk where the two men were facing each other and got out to investigate. A.E. 112:27-28. Wilkins's back was to Scarrott and Koponen, and Phillips was facing the two officers, as the officers got out of their patrol car. A.E. 60:14; 157:17-18, 304.

What happened next transpired in a matter of only a few seconds. As Scarrott and Koponen were getting out of their patrol car, they both saw Wilkins kick Phillips forcefully in the lower stomach or groin, and they saw Phillips fall to the ground in reaction to the kick. A.E. 59:12-13; 72:12-21; 113:1-5. Wilkins then pulled a non-police-issue handgun from his waistband and leveled it at Phillips's head from about one foot away. A.E. 59:16-17; 73:6-7, 113:11-13; 128:2-4. Upon seeing this, Officer Koponen yelled, "he's got a gun!" A.E. 59:16-17, 80:8-9, 113:14-15. Wilkins immediately pulled back the hood of his sweatshirt, glanced over his shoulder at Officers Koponen and Scarrott and said in a loud voice: "It's me, Willie," and then he looked back toward Phillips, all the while keeping his gun trained on Phillips's head. A.E. 82:8-14, 83:16-26.

Neither Scarrott nor Koponen knew Officer Wilkins, and neither had ever seen him before that evening. A.E. 60:14-18, 113:21-27) Neither suspected that the man with the gun might be an undercover police officer. A.E. 60:9-10, 60:15.[2] In fact, Phillips himself, who had been interacting with Wilkins for as much as a minute prior to Scarrott and Koponen's arrival, had no idea that the man pointing the gun at him was a police officer. A.E. 81:14-17; 109. Phillips thought Wilkins might be the owner of the truck he had stolen earlier that night. *Id.* Although both Scarrott and Koponen saw Wilkins glance back over his shoulder at them, neither of them heard him say anything. A.E. 59:22-24; 74:5-75:5. Both officers believed Wilkins was about to shoot Phillips, and Phillips himself believed he was about to be executed. A.E. 59:25-60:7; 113:14-17; 75:104; 106-108.

Officers Scarrott and Koponen both opened fire simultaneously, expending thirteen or fourteen rounds at Wilkins and hitting him nine times. App., *infra*, 7a. As they fired, both Scarrott and Koponen were convinced that shooting Wilkins was the only way for them to keep him from murdering Phillips. A.E. 60:5-7, 113:14-24. Immediately after Phillips fell to the ground, Officer McClure, another officer at the scene (who had in fact known Wilkins for several years but did not recognize him initially), approached Wilkins and handcuffed him, treating him as a criminal suspect. A.E. 168:19-22, 169:19-23.

2. Neither Scarrott nor Koponen were aware of the presence of any undercover officers in the area. A.E. 232, 240, 266. Although Wilkins had made several broadcasts on the radio channel that Scarrott and Koponen were monitoring, Wilkins had never identified himself, given his location, or said anything to indicate to other officers that he was in plain clothes. A.E. 127:21-26, 132:5.

Only one other police officer, Torrey Nash, was at the scene.[3] Officer Nash was a long time friend of Wilkins. A.E. 299. Nash had spoken with Wiklins for about fifteen minutes just a few hours before the incident, and Nash immediately recognized Wilkins by the clothes he was wearing. A.E. 304. Nash apparently did *not* see Wilkins kick Phillips. *See* A.E. 514:14 - 515:10. Nash *does* recall hearing someone (presumably either Scarrott or Koponen, and possibly both) yelling, "He has a gun!" *Id.* He also recalled someone yelling "Police!" and "Get your hands up!" A.E. 304, 305. Nash also recalls saying at some point either "It's Willie" or "It's a cop" just before Scarrott and Koponen opened fire, but he uttered these words "without speaking to anyone in particular." A.E. 156:25-27. It is undisputed that in fact neither Scarrott nor Koponen heard him. A.E. 60:16-17; 113:21-24.[4]

---

3. The court of appeals repeatedly refers to "the other police *officers* [plural] at the scene" who either "described . . . the scene as consistent with police procedure for high risk arrests" or who "[were *not*] operating under the mistaken impression that Officer Wilkins was a civilian threatening another civilian with a gun." App., *infra*, 7a, 10a. The lower court's use of the plural in these references is mistaken because there were only five officers at the scene – Scarrott, Koponen, Wilkins, McClure and Nash – and only Nash testified that he recognized Wilkins to be a police officer attempting an arrest.

4. At his deposition, Officer Nash expressed the opinion that a reasonable police officer should have known that Officer Wilkins was a fellow officer making an arrest based on the manner in which Wilkins approached Phillips. A.E. 308. However, Nash refused to opine that it was impossible for Scarrott or Koponen to have mistaken Wilkins for a civilian. *Id.*

B. Statement of the Case

Officers Scarrott and Koponen moved for summary judgment based in part on qualified immunity. A.E. 26. The district court denied the motion, stating:

> . . . Applying the test set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), the Court finds:
>
> > a. Triable issues of material fact exist which, if resolved in plaintiffs' favor, would support a finding that defendants used unreasonable force and thus violated the decedent's right under the Fourth Amendment to be free from unreasonable seizure.
> >
> > b. Such right was clearly established and, viewing the disputed material facts in the light most favorable to plaintiffs, it would have been clear to a reasonable officer that his conduct was unlawful in the situation confronted.

App, *infra*, 15a. The district court's order did not specify which material facts were in dispute or what evidence it found raised triable issues as to those facts.

The Ninth Circuit affirmed. The court began by noting that under *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995), its jurisdiction was limited to whether Officers Scarrott and Koponen are entitled to qualified immunity. App., *infra*, 2a-4a. The court began its

qualified immunity analysis by acknowledging that it was bound to apply the two-step analysis set forth in *Saucier v. Katz*. App. 9a.

Under *Saucier*, the "initial inquiry," or "threshold question," is whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right." 533 U.S. at 201, 121 S. Ct. at 2156. If not, the lawsuit terminates and qualified immunity has no job to do. *Id.* If so, however, "the next, sequential step is to ask whether the right is clearly established" – an inquiry which "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* At this stage, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation confronted." *Id.* at 202, 121 S. Ct. at 2156.

The Court of Appeal (citing *Saucier*) described the second step as "an inquiry into the reasonableness of the officer's belief in the legality of his actions," App., *infra*, 10a, and then proceeded to dispense entirely with that inquiry:

> For the reasons outlined below, we do not need to reach the second step of the qualified immunity analysis to resolve this case.

App., *infra*, 10a. The court reached this result by concluding:

> [T]here is no question whether the officers actions in this case violated clearly established law. They did.

App., *infra*, 11a-12a. The court then returned to step one, where it addressed what it considered to be "[t]he only question for resolution[:] . . . whether [the officers'] belief in the necessity of their actions was objectively reasonable." However, instead of undertaking the inquiry "in light of the specific context of the case," which would have entailed examining the record to ascertain whether, viewing the disputed facts most favorably to the plaintiffs, Scarrott and Koponen's mistake was one that a reasonably prudent officer confronted with the same circumstances could have made, the court simply concluded that "the answer to that question depends on disputed issues of material fact [and therefore] is not a legal inquiry, but rather a question of fact best resolved by a jury." App. 12a. Like the district court, the court of appeal did not specify what those factual issues are, but it nevertheless asserted that they were "hotly disputed" and "likely to prove dispositive" at trial. *Id.*

REASONS FOR GRANTING THE PETITION

While purporting to follow this Court's precedent, the various courts of appeal have developed two divergent approaches to the issue of qualified immunity. The decision from which this petition arises represents one such approach. Because this decision undermines the purposes of the immunity as expressed by this Court, petitioners respectfully request that the Court grant this petition.

1. For more than a quarter century this Court has recognized the doctrine of qualified immunity to promote the vigorous exercise of official authority by protecting public officials against liability when they exercise their discretionary authority in a reasonable manner, even if in hindsight they turn out to have been mistaken.

Butz v. Economou, 438 U.S. 478, 506-508, 98 S. Ct. 2894, 2910-2912, 57 L. Ed. 2d 895 (1978); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S. Ct. 2727, 2736, 73 L. Ed. 2d 396 (1982). The protection afforded by qualified immunity is strengthened by this Court's insistence that, because it provides immunity from suit instead of a mere defense to liability, issues relating to qualified immunity must be resolved "at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (*per curiam*), [the immunity is "effectively lost if a case is erroneously permitted to go to trial."]; *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985). Indeed, this Court adopted a standard of "objective reasonableness" with the explicit goal of encouraging courts to grant summary judgment in appropriate cases. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-818, 102 S. Ct. 2727, 73 L. Ed. 2d 396.

Under this Court's standard, immunity attaches unless no competent officer could have reasonably believed that the conduct was lawful. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271 (1986) ["Defendants will not be immune if, on an objective basis, it is obvious that *no* reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." (Emphasis added.)]; *see also Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 3040, 97 L. Ed. 2d 523 (1987) ["the objective (albeit fact-specific) question [is] whether a reasonable officer could have believed [the defendant's actions] to be lawful, in light of clearly established law and the information the [defendant] possessed"]. Thus, the test for qualified immunity does *not* require the defendant officer to prove that his or her conduct

was reasonable, but rather to demonstrate that a competent public official confronted with the same situation *could have believed* it to be reasonable.

In *Saucier v. Katz*, the Court applied these principles to clarify the test for qualified immunity in the context of a summary judgment motion brought in an excessive force case. *Saucier* requires a two-step analysis. In the threshold first step, the court must ascertain whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right." 533 U.S. at 201, 121 S. Ct. at 2156. If so, "the next, sequential step is to ask whether the right was clearly established" – an inquiry that "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* For purposes of this second step, and consistent with the principle articulated in *Anderson* and *Malley*, "the relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation confronted." *Id.* at 202, 121 S. Ct. at 2156. The *Saucier* Court went on to admonish that "to deny summary judgment any time a material issue of fact remains on the excessive force claim [] could undermine the goal of qualified immunity to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Ibid.*

Since *Saucier*, a majority of the courts of appeals have followed this admonition by applying a straightforward analytical approach to determining whether qualified immunity applies in excessive force cases. Under this approach, the courts assume that all controverted material facts have been resolved in favor of the plaintiff and then ask whether a competent officer confronted by the situation

so presented *could have reasonably believed* that the level of force used was legal. If the answer is "yes" – even though other reasonable officers might have concluded otherwise – immunity attaches. In other words, if competent officers, based on plaintiff's version of the facts, could differ on the question of reasonableness, a court must enter summary judgment granting immunity to the officer.

The Ninth Circuit, however, has charted a different and analytically flawed course. Joined by at least some panels of the courts of appeals in the Third, Eighth and Tenth Circuits,[5] the Ninth Circuit has incorrectly read *Saucier* as requiring the denial of summary judgment whenever factual disputes bearing on reasonableness exist. That is, instead of asking the correct question – could a competent officer, based on plaintiff's version of the facts, have reasonably believed the level of force was lawful – the Ninth Circuit would deny summary judgment unless the court is able to decide, as a matter of law, that the officer's conduct was reasonable.

The analysis employed by the Ninth Circuit assures that most claims arising under the Fourth Amendment, will proceed to trial in defiance of the clear contrary direction of this Court. The instant case is a striking example of the negative impact of this error. As explained below, had the Ninth Circuit employed the correct test, petitioners, who were called upon to make a life and death decision in a matter of seconds, would have been entitled to immunity, since there is no doubt, based on plaintiffs' version of the facts, that a competent officer reasonably could have believed that force used was necessary and lawful, even though other competent offers might have disagreed.

---

5. *See* section 3 *infra*.

Because of the importance to the day to day work of the federal judiciary in having courts apply the proper standard in determining entitlement to qualified immunity before trial,[6] this court should grant the petition and bring uniformity of decision to this vital area of the law.

2. Although the court below correctly recognizes that *Saucier* requires a two step analysis where qualified immunity is claimed, the court did not undertake the analysis in accordance with *Saucier* and other pertinent decisions of this Court. In this section, petitioners describe the error of the Ninth Circuit's reasoning and its potential for substantially limiting the intended scope of qualified immunity.

According the Ninth Circuit, "the first step in the analysis is an inquiry into the objective reasonableness of the officer's belief in the *necessity* of his actions, and there is no Fourth Amendment violation if the officer can satisfy this standard." (Emphasis original; citations omitted.) App., *infra*, 9a.

> [The second] step, in contrast to the first, is an inquiry into the reasonableness of the officer's belief in the *legality* of his actions. *Saucier*, 533 U.S. at 206. Even if his actions did not violate the Fourth Amendment, a reasonable but mistaken belief that his conduct was lawful would result in a grant of qualified immunity.

[Emphasis original.] App., *infra*, 10a. Having stated these general propositions, the court declares that it need not "reach

6. The issues raised by this appeal are a recurring ingredient of the day-to-day work of the federal court system. For instance, between the first of this year and April 26, 2004, 59 cases were published in the Westlaw system from all Courts of Appeals which cited both "qualified immunity" and this Court's decision in *Saucier*. Every Court of Appeals is represented among those 59 cases.

the second step of the qualified immunity analysis to decide this case." *Id.* Instead, the court finds that "the officers' entitlement to summary judgment is determined solely by application of the first stage. . . ." App., *infra*, 11a.

The court's reasoning in support of this conclusion, while not entirely clear, appears to begin by noting that because the petitioners were operating under the mistaken impression that Officer Wilkins was a civilian threatening another civilian with a gun, "this case does not present the usual questions, where a given set of facts is known to all parties, and the issue on appeal is whether the defendants' actions were prohibited by the Constitution, or whether their mistaken belief that the conduct was lawful was in fact reasonable." App., *infra*, 10a. The court then goes on to hold that because it is clearly established that the Fourth Amendment bars the use of deadly force against an officer effecting an arrest, petitioners "could not have been reasonably mistaken as to the legality of their actions had they realized that Officer Wilkins was a police officer." App., *infra*, 11a. "The crucial question, therefore, is whether their mistaken belief that Wilkins was a civilian was reasonable under the circumstances." *Id.* According to the court, this question is resolved in first step of the qualified immunity analysis, and consequently step two does not need to be reached. Having created this analytic framework, the court then found that the first step cannot be resolved on summary judgment because the question of the reasonableness of petitioners' belief with regard to Officer Wilkins' status "depends on disputed issues of material fact, it is not a legal inquiry, but rather a question of fact best resolved by the jury." [Citations omitted]. App., *infra*, 12a.

The core error in the Ninth Circuit's approach is the failure, as required by numerous decisions of this Court,

to determine whether, taking the facts in the light most favorable to the plaintiff, a competent officer in the situation petitioners confronted reasonably could have believed the level of force used was lawful. This determination can and should be made on summary judgment since the court is applying the applicable legal standard to plaintiffs' version of the facts. In this posture, no factual issues need to be resolved; the inquiry – contrary to the Ninth's Circuit's holding – is a purely legal one. If the court finds, as a matter of law, that a competent officer could have found the force used reasonable, even if other competent officers might have disagreed, then immunity attaches. *Malley v. Briggs, supra*; *Anderson v. Creighton*, *supra*. A trial to resolve factual disputes is needed only if, on plaintiff's version, no competent officer could have concluded the level of force used was reasonable.

The decision below inverts this test; under the Ninth Court's reasoning, if a court finds that a reasonable officer could disagree with the defendants, then the immunity vanishes at the summary judgment stage. Under this standard, an officer is never entitled to summary judgment on a claim of qualified immunity unless he or she can demonstrate, on the plaintiff's version of the facts, that the use of force was, as a matter of law, reasonable.

The Ninth Circuit's error arises out of its misreading of *Saucier* that the second stage of qualified immunity analysis is limited to measuring the clarity of the legal standard. The Ninth Circuit relied on language in *Saucier* that "the concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." 533 U.S. at 284. However, this language does not limit a court's work to surveying

the law. "Excessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred." *Id.* at 285. *Saucier* held that ruling in *Anderson v. Creighton* is fully applicable to excessive force cases. *Id.* at 283. In *Anderson*, this Court found that officers who mistakenly concluded they had probable cause for a warrantless search could be entitled to qualified immunity even though the standard for such searches was "firmly established." 107 U.S. at 640. After *Anderson*, courts weighing the objective reasonableness of official conduct may consider whether the officers have correctly applied the legal standard to the facts which they confronted:

> We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment. Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.

Id. at 644.[7]

As a result of its failure to look beyond the clarity of the legal standard, the Ninth Circuit never performed the analysis

---

7. Similarly, in *Saucier* the Court rejected the notion that *Anderson* should not apply to excessive force because the standard under *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), provides "ample guidance for particular situations." 533 U.S. at 283. This fact, the Court found, did not justify a more limited role for qualified immunity in excessive force cases. *Id.*

required by *Saucier*. In cases challenging an officer's use of force, the second stage of qualified immunity operates "to protect officers from the sometimes 'hazy border between excessive and acceptable force.'" *Saucier*, 533 U.S. at 284, *quoting Priester v. Riviera Beach*, 208 F.3d 919, 926-927 (11th Cir. 2000). The immunity will therefore protect officers unless "application of the excessive force standard would inevitably lead every reasonable officer in the Defendants' position to conclude the force was unlawful." *Priester v. Rivera Beach*, *supra* [internal quotations and citations omitted]. The correct application of this rule requires that, in order to defeat summary judgment, plaintiff must demonstrate that pre existing law "truly compel[s] (not just suggest[s] or allow[s] or raise[s] a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances." *Id.*

As this Court recognized in *Anderson v. Creighton*, *supra*, 483 U.S. at 641, a court must undertake a "fact-specific" inquiry in order to resolve "whether a reasonable officer could have believed [the defendant's conduct] to be lawful." Since "disputed facts will exist in virtually every confrontation between citizens and law enforcement officers . . ." *Elliott v. Leavitt*, 105 F.3d 174, 176 (4th Cir. 1997), the Ninth Circuit's formulation of the qualified immunity question assures that summary judgment will be denied in the routine Fourth Amendment case.[8]

---

8. As the court in *Winfield v. Bass*, 106 F.3d 525, 535 (4th Cir. 1997), observed:

> Whether the abstract legal right asserted by the plaintiff is "clearly established" will rarely be the controversy in

(Cont'd)

This result defeats a core purpose of this Court's work in the area of qualified immunity. "We repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, *supra*, 502 U.S. at 227, *citing, Harlow v. Fitzgerald*, *supra*, 457 U.S. at 818; *Davis v. Scherer*, 468 U.S. 183, 195, 104 S. Ct. 3012, 3019, 82 L. Ed. 2d 139 (1984); *Mitchell*, *supra*, 472 U.S. at 526; *Malley v. Briggs*, *supra*, 475 U.S. at 341; *Anderson*, *supra*, 483 U.S. at 646, n.6.

3. Courts of Appeal have adopted different standards for determining whether officials are entitled to qualified immunity. Some employ the same incorrect analysis as the Ninth Circuit, while others employ a standard consistent with this Court's precedent. As a result, public officials receive markedly divergent results on their claims to immunity.

A number of courts of appeal have given the same restricted treatment to qualified immunity as the Ninth. In a decision filed just last week, the Third Circuit affirmed the denial of summary judgment to paramedics and police officers based on qualified immunity because of factual disputes regarding the reasonableness of defendants' actions. *Rivas v. City of Passaic*, __ F.3d __, 2004 WL 877645 (3rd Cir. 2004). Like the Ninth Circuit, the *Rivas* decision limited its analysis of qualified immunity to whether the legal standard was clearly established. It found that "as a general proposition," that the paramedics "may not abandon a private citizen in a dangerous situation, provided that the state actors are aware of the risk of serious harm and are partly

(Cont'd)

> a denial of a qualified immunity defense. The primary issue will almost always be whether the given facts demonstrate that the right in question has been violated.

responsible for creating the opportunity for that harm to happen." *Id.* at 16. Because the law was sufficiently clear to put defendants "on notice that their conduct, if deemed unlawful, would not shield them with immunity." *Id.* In other words, the Third Circuit, like the Ninth, equated the standard for qualified immunity with standard for liability on the merits of the constitutional claim. The *Rivas* court reasoned that if defendant's conduct was unlawful, then defendants would be deprived qualified immunity because the governing standard was clear, albeit only as a "general proposition." The Third Circuit applied the same reasoning to the police officer defendants. Because the facts relevant to the excessive force claim were disputed, the court concluded the qualified immunity issue could not be resolved on summary judgment. *Id.* In fact, the police officer defendants were charged with utilizing excessive force while restraining a man who was undergoing a seizure. They contended that the man bit them and appeared to be reaching for their gun. However the *Rivas* court found that the defendants' claim that they "reasonably perceived the facts to be different from those alleged by the plaintiff" could only be considered at trial. *Id.* at 14. As a result, the Third Circuit never considered whether a reasonable officer could have perceived the threat in the same way the defendants did. Similarly, in *Kopec v. Tate*, 361 F.3d 772 (3rd Cir. 2004), the Third Circuit, like the Ninth, inverted the qualified immunity standard and denied summary judgment where there was *any* dispute as to the reasonableness of the officer's actions. Instead of granting summary judgment where the defendant's actions were arguably reasonable, the Third Circuit required the defendant to demonstrate that "as a matter of law . . . a reasonable officer would not have known that [his or her] conduct was in violation of the Fourth Amendment . . ." *Id.* at 777.

Following a path similar to that of the Ninth Circuit, the Tenth Circuit in *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1314 (10th Cir. 2002), found that excessive force standard under *Graham v. Connor* is "clearly established for the purposes of § 1983 actions." As a result, the *Olsen* court found qualified immunity an inappropriate subject for summary judgment. "Because the reasonableness inquiry overlaps with the qualified immunity analysis, 'a qualified immunity defense [is] of less value when raised in defense of an excessive force claim.'" *quoting Medina v. Cram*, 252 F.3d 1124, 1131 (10th Cir. 2001). Because the question whether an officer acted reasonably in using deadly force is "heavily fact dependent," the *Olsen* court concluded that, "this court will not approve summary judgment in excessive force cases—based on qualified immunity or otherwise—if the moving party has not quieted all disputed issues of material fact." 312 F.3d at 1314; citing *Allen v. Muskogee*, 119 F.3d 837, 840-842 (10th Cir. 1997). Utilizing the same analysis as the Ninth Circuit, the Tenth Circuit thus announces a rule that will generally preclude resolving excessive force cases by summary judgment on qualified immunity grounds.

In *Wilson v. City of Des Moines, Iowa*, 293 F.3d 447, 454 (8th Cir. 2002), the Eight Circuit denied summary judgment to two officers who had employed deadly force against a suspect they believed to be armed. Because of "internal discrepancies and variations in the officers' testimony," the court denied summary judgment on the grounds that, "the current record does not conclusively establish the reasonableness of the officers' actions or beliefs." By requiring the officers to "conclusively establish" the reasonableness of their actions, the Eighth Circuit, like the Ninth, never considered whether a reasonable officer *could have* thought the defendants' actions lawful.

In contrast, other Circuits employ an analysis which conforms to this Court's view of qualified immunity. For instance, the Eleventh Circuit applies a standard of "arguable probable cause" to qualified immunity rather than the "higher standard of actual probable cause." *Jones v. Cannon*, 174 F.3d 1271, 1283, n.3 (11th Cir. 1999). Under this test, "an officer will be entitled to qualified immunity if he had 'arguable probable cause' to employ deadly force; in essence, we decide whether 'the officer reasonably could have believed that probable cause existed' to use deadly force." *Vaughan v. Cox*, 343 F.3d 1323, 1332 (11th Cir. 2003), *quoting Montoute v. Carr*, 114 F.3d 181, 184 (11th Cir. 1997). *See also Provost v. City of Newburgh*, 262 F.3d 146, 169 (2d Cir. 2001) ["In an unlawful arrest action, an officer is immune if he has arguable probable cause, and is subject to suit only if his judgment was so flawed that no reasonable officer would have made a similar choice." [internal quotations and citations omitted.]]; *Humphrey v. Staszak*, 148 F.3d 719, 725 (7th Cir. 1998) ["Arguable probable cause exists when 'a reasonable police officer in the same circumstances and with the same knowledge and possessing the same knowledge as the officer in question *could* have reasonably believed that probable cause existed in light of well-established law.'"], *quoting Gold v. City of Miami*, 121 F.3d 1442, 1445 (11th Cir. 1997).

Other courts of appeal, while not using the "arguable probable cause" terminology use a similar analysis. These courts ask whether a reasonable officer *could have* believed the challenged action to be lawful. For instance, in *Hegarty v. Somerset County*, 53 F.3d 1367, 1375-1376 (1st Cir. 1995), *cert. den. sub nom., Hegarty v. Wright*, 516 U.S. 1029, 116 S. Ct. 675, 133 L. Ed. 2d 524 (1995) the court held:

> We must isolate all reasonably reliable information collectively known to the officers at the time their

> challenged conduct occurred, *without indulging hindsight*, to determine whether an "objectively reasonable officer" with the identical information, *could* have concluded that there were exigent circumstances sufficient to support an immediate forcible entry of the Hegarty cabin to effect Katherine's warrantless arrest.

[internal quotations and citations omitted, emphasis in original]]; *see also Lennon v. Miller*, 66 F.3d 416, 421 (C.A.2 (N.Y.), 1995) ["Thus, if the court determines that the only conclusion a rational jury could reach is that reasonable officers would disagree about the legality of the defendants' conduct under the circumstances, summary judgment for the officers is appropriate."]; *Gomez v. Atkins*, 296 F.3d 253, 261-2 (4th Cir. 2002) ["In our assessment of whether Atkins is entitled to qualified immunity, however, the question is not whether there actually was probable cause for the murder warrant against Isidro, but whether an objective law officer could reasonably have believed probable cause to exist."]; *Estep v. Dallas County*, 310 F.3d 353, 361 (5th Cir. 2002) ["In our view, the constitutional violation in this case is clear-cut and obvious. No reasonable police officer could have really believed that a search was constitutional under the circumstances presented."]; *Scott v. Clay County*, 205 F.3d 867, 877 (6th Cir. 2000) [summary judgment on qualified immunity appropriate "when the undisputed material facts, on the plaintiff's version of disputed material facts, demonstrate that a hypothetical reasonable officer would not have known that his actions, under the circumstances, were objectively unreasonable."]; *Payne v. Pauley*, 337 F.3d 767, 780 (7th Cir. 2003) ["If the facts as alleged by Payne are found to be true, then and only then, should it have been clear to Officer Pauley, or to any reasonable officer under these circumstances, that it would be unlawful to use the amount of force he did to arrest Payne."]

The test which the court employs will, in many cases, determine the outcome of the officer's right to immunity.[9] When courts correctly apply the standard of objective reasonableness, officers will be entitled to qualified immunity even when there is a dispute as to whether the officers violated the Fourth Amendment. For instance, in *Hegarty v. Somerset County, supra,* 53 F.3d 1367, 1377, the court found the officer immune, even though the officer's choice of strategy was questioned:

> we do not determine which of these strategies represented the *more* prudent course or posed the *least* serious risk to the suspect, the officers or others in the vicinity. Rather, we consider only whether a competent police officer in these circumstances reasonably could have opted for an unannounced approach to the cabin walls forthwith.

See also Anderson v. Russell, 247 F.3d 125, 131 (4th Cir. 2001) [officers immune for use of force despite dispute as to reasonableness of conduct]; *Altman v. City of High Point*, 330 F.3d 194, 206-206 (4th Cir. 2003) [same]; *Mace v. City of Palestine*, 333 F.3d 621, 624-5 (5th Cir. 2003) [Regarding use of deadly force: "[a]lthough, in retrospect, there may have been alternative courses of action for Henderson to take, we

---

9. Of course, in some cases, the officer will not be entitled to qualified immunity because, under the version of the facts most favorable to the plaintiff, no reasonable officer could believe that the conduct alleged by the plaintiff was constitutional. *See, e.g., Estep v. Dallas County, supra*; *Payne v. Pauley, supra.* However, there are a significant number of cases where the reasonableness of a defendant's conduct is subject to debate, and therefore, qualified immunity should attach.

will not 'use the 20-20 vision of hindsight' to judge the reasonableness of Henderson's use of force."]; *Scott v. Edinburg*, 346 F.3d 752, 759-760 (7th Cir. 2003) [Officer entitled to immunity for use of deadly force to protect bystanders despite conflicting evidence from eyewitnesses]; *Carr v. Tatangelo*, 338 F.3d 1259, 1269, n.20 (11th Cir. 2003) [Immunity for use of deadly force proper despite plaintiff having "stated a cognizable Fourth Amendment seizure claim."]; *Willingham v. Loughnan*, 321 F.3d 1299, 1304 (11th Cir. 2003); *Vaughan v. Cox*, *supra*, 316 F.3d at 1213-4 [defendant entitled to qualified immunity for use of deadly force despite fact that "a reasonable jury, under Vaughan's version of the events, could find that Deputy Cox's conduct violated the Fourth Amendment."] Had the courts in these cases applied the test defined by the Ninth Circuit, they would have concluded that summary judgment was improper.

4. If the analysis required by this Court had been employed, the courts below would have concluded that petitioners were entitled to qualified immunity.

There is no question that if it were true that Wilkins was about to shoot Phillips, petitioners were entitled to use deadly force. *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985); *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir. 1997). Because a warning was not feasible, the Fourth Amendment did not require petitioners to give one before taking action. *Krueger v. Fuhr*, 991 F.2d 435, 440 (8th Cir 1993), *cert. denied*, 510 U.S. 946, 126 L. Ed. 2d 335, 114 S. Ct. 386 (1993) ["However, we are satisfied that under the urgent circumstances facing Officer Fuhr, the absence of a warning immediately preceding the shooting does not render his use of deadly force constitutionally unreasonable."] Moreover, although petitioners never thought

that Wilkins was a police officer before firing their weapons, petitioners had a duty to prevent him from carrying out what appeared to them to be an unjustified use of deadly force regardless of his status. Officers are required to intervene to prevent the violation of civil rights by another law enforcement officer or face civil liability themselves. *Ensley v. Soper*, 142 F.3d 1402, 1407-08 (11th Cir. 1998) ["[I]f a police officer, whether supervisory or not, fails or refuses to intervene when a constitutional violation such as an unprovoked beating takes place in his presence, the officer is directly liable[.]"] Nor do respondents contend that petitioners were acting from an improper motive or outside their role as law enforcement officers.[10]

The petitioners' right to qualified immunity therefore presents a straightforward question: *could* a reasonable officer facing the circumstances the petitioners faced conclude that immediate force was necessary to protect the life of Demetrius Phillips? Although the Ninth Circuit undertook no analysis, none of the facts cited in the decision below support the conclusion that the petitioners' decision was an unreasonable one. The fact that Officer Wilkins said, "it's me, Willie" would not have informed petitioners that Wilkins was a police officers, even if the petitioners had been

---

10. Respondents conceded that the decisions in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998); *Moreland v. Las Vegas Metropolitan Police Dept.*, 159 F.3d 365 (9th Cir. 1998) mandated the conclusion that petitioners were entitled to judgment on petitioner's motion for summary judgment on substantive due process. A.E. 200. Respondents thus acknowledged that there are no facts that would support a conclusion that petitioners acted with an intent to harm unrelated to a legitimate law enforcement purpose. *County of Sacramento*, 523 U.S. at 836; *Moreland*, 159 F.3d at 372-3.

able to hear the statement. Wilkins' failure to clearly identify himself and his true motives had a tragic outcome but it is only with the benefit of hindsight that petitioners can possibly be faulted for drawing the conclusion they did. Nor is the fact that another police officer at the scene, Officer Nash, recognized Officer Wilkins even relevant. Unlike the petitioners, Officer Nash knew Officer Wilkins and had spoken to him a few hours earlier. Similarly, Officer Nash's opinion that Wilkins approached Phillips in a manner consistent with a police officer making an arrest is only marginally relevant at best. At most, his opinion shows only that an officer could disagree with petitioners. Important in this regard, Officer Nash did *not* observe Wilkins kicking a nonthreatening suspect actions which are contrary to standard patrol police practice and which led the petitioners to the opposite conclusion from Officer Nash. A.E. 16:17-24. Viewing the entire record[11] from "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," *Graham v. Connor, supra,* 490 U.S. at 396, the scene which unfolded before petitioners demanded instantaneous, decisive action. As this Court has observed,

---

11. Stating that "the key issue in this case is not whether the 'undisputed facts establish that the actions of the officers were objectively reasonable and not a violation of Wilkins' constitutional right,'" the court below took the position that "it is the *disputed* facts that are crucial" for the qualified immunity analysis [cite]. If it is the Ninth Circuit's position that a court should consider less than the entire record, then it has committed another error. *Kuha v. City of Minnetonka*, 328 F. 3d 427, 438 (8th Cir. 2002) ["We are mindful that we must construe the facts in the light most favorable to Kuha and we do so. But we cannot ignore the undisputed facts that are equally relevant to our analysis."]; *see also Winfield v. Bass*, 106 F.3d 525, 534-5 (4th Cir. 1996) [In addition to facts supporting decision denying qualified immunity, "we should not ignore other, undisputed, facts in rendering our decision . . ."]

police officers "must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." *Scheuer v. Rhodes*, 416 U.S. 232, 246, 94 S. Ct. 1683, 1691, 40 L. Ed. 2d 90 (1974); *see also Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996) ["The Fourth Amendment does not require officers to wait until a suspect shoots to confirm that a serious threat of harm exists."]

Several other factors make qualified immunity appropriate in the circumstances facing the petitioners. Both officers independently concluded that they should fire their weapons. Neither they nor Mr. Phillips believed Wilkins to be a police officer and all three believed that Wilkins intended to shoot Phillips. The petitioners were required to make an instantaneous decision based only on what they were able to perceive in the moment. Finally, the petitioners believed that Mr. Phillips had only seconds to live. It appeared to the petitioners that further delay and contemplation of alternatives would only result in Phillips' death. It can hardly be said that the petitioners actions "truly compel" the conclusion for every like-situated reasonable officer that petitioners' actions violated the constitution. *Priester v. City of Rivera Beach, supra.*

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

JOHN A. RUSSO
RANDOLPH W. HALL
WILLIAM E. SIMMONS
City of Oakland
One Frank H. Ogawa Plaza
6th Floor
Oakland, CA 94612
(510) 239-3751

TODD BOLEY
Counsel of Record
HENRY S. HEWITT
MARK L. MOSLEY
ERICKSON, BEASLEY, HEWITT
& WILSON LLP
483 Ninth Street, Suite 200
Oakland, CA 94607
(510) 839-3448

Counsel for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ARGUED AND SUBMITTED NOVEMBER 20, 2003

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-15086

D.C. No.
CV-01-01402-MMC

Kely Wilkins, Individually and as the Successor in Interest to Decedent William Alberto Wilkins; William Alberto Wilkins, Individually; The Estate of William Wilkins; William Randolph Wilkins, a minor, by and through his Guardian Ad Litem, Kely Wilkins; Fernando Wilkins, Individually; Josefina Wilkins, Individually,

Plaintiffs-Appellees,

v.

CITY OF OAKLAND,

Defendant,

v.

Tim Scarrott, individually, and in his official capacity as a Police Officer for the City of Oakland; Andrew Koponen, individually, and in his official capacity as a Police Officer for the City of Oakland,

Defendants-Appellants.

Appendix A

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted
October 6, 2003—San Francisco, California

Filed November 20, 2003

Before: Procter Hug, Jr., Betty B. Fletcher, and
A. Wallace Tashima, Circuit Judges.

Opinion by Judge B. Fletcher

OPINION

B. FLETCHER, Circuit Judge:

Defendants-Appellants Tim Scarrott and Andrew Koponen, Police Officers for the City of Oakland ("Scarrott and Koponen," or "the officers"), raise several issues on appeal. We conclude that we have jurisdiction to consider only the district court's denial of their motion for summary judgment on the ground of qualified immunity. We affirm.

JURISDICTION

This court has jurisdiction under 28 U.S.C. § 1291 over an interlocutory appeal where the ground for the motion in question is qualified immunity. *Jeffers v. Gomez*, 267 F.3d 895, 903 (9th Cir. 2001) (per curiam); *Schwenk v. Hartford*, 204 F.3d 1187, 1195 (9th Cir. 2000). In such circumstances,

however, appellate review is generally limited to issues of law, *see Johnson v. Jones*, 515 U.S. 304 (1995), and "does not extend to claims in which the determination of qualified immunity depends on disputed issues of material fact." *Jeffers*, 267 F.3d at 903; *see Behrens v. Pelletier*, 516 U.S. 299, 306 (1996).

The first question to be resolved, therefore, is whether this court has jurisdiction over all the issues raised on appeal. In *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), the Supreme Court held that a district court's rejection of a claim of qualified immunity, "to the extent that it turns on an issue of law," is a final decision subject to immediate appeal under 28 U.S.C. § 1291. Nevertheless, we are not precluded from hearing this interlocutory appeal merely because there are issues of fact in dispute. *See Jeffers*, 267 F.3d at 903; *Schwenk*, 204 F.3d at 1195; *Knox v. Southwest Airlines*, 124 F.3d 1103, 1107 (9th Cir. 1997). Where disputed facts exist, we will determine if the denial of qualified immunity was proper by assuming that the version of events offered by the non-moving party is correct.

It is well-established that "an appellate court lacks jurisdiction over an interlocutory appeal challenging the sufficiency of the evidence supporting the trial court's conclusion that an issue of fact exists." *Jeffers*, 267 F.3d at 903, citing *Johnson*, 515 U.S. at 313. The opinion in *Jeffers* explained that "any issue of law, including the *materiality* of the disputed issues of fact, is a permissible subject for appellate review." 267 F.3d at 905 (emphasis added). Thus this court has jurisdiction to consider whether, even

accepting the Wilkinses'[1] version of the events on January 11, 2001, the alleged conduct of the officers violated a clearly established legal standard. *See Knox*, 124 F.3d at 1107 (distinguishing *Johnson*, where the defendant simply denied having committed the alleged acts, from the situation where the motion presents only the legal question of whether the alleged conduct violated a clearly established right).

The officers raise three issues in their appeal of the denial of qualified immunity, arguing that: (1) they did not violate the decedent Wilkins' Fourth Amendment right; (2) the trial court did not identify facts which would support such a finding; and (3) even if there were a triable issue of fact on the alleged Fourth Amendment violation, the officers are entitled to qualified immunity. We have no jurisdiction over the first two issues in this interlocutory appeal, because they focus on the merits of the Wilkinses' claim, not the materiality of disputed facts, nor the legal issues relevant to qualified immunity. On an interlocutory appeal of a denial of qualified immunity, this court does not have jurisdiction to rule on the merits of the Wilkinses' Fourth Amendment claim, nor may it conduct an inquiry into the sufficiency of evidence to support a finding that the officers did in fact violate Wilkins' constitutional right. Contrary to the arguments of the officers in their brief, the key issue in this case is not whether the "undisputed facts establish that the actions of the officers were objectively reasonable and not a violation of Wilkins'

---

1. Appellees are the decedent Wilkins' estate, his parents, his widow and child (hereinafter "the Wilkinses"). References to "the Wilkinses" are therefore to the parties who are the appellees in this case; references to "Wilkins" are to the decedent whose Fourth Amendment right was allegedly violated by the officers.

constitutional right." As we explain below, in this case it is the *disputed* facts that are crucial for both the qualified immunity analysis and the eventual disposition of the Wilkinses' claim on the merits. The issue for decision is thus whether the officers are eligible for qualified immunity under the Wilkinses' version of the disputed facts.

Resolving all factual disputes in the Wilkinses' favor, therefore, we may consider only whether Scarrott and Koponen are entitled to qualified immunity from the Wilkinses' § 1983 claim.

FACTUAL AND PROCEDURAL BACKGROUND

The parties recount different versions of the events that took place on the night of January 11, 2001. Although some of the relevant facts are undisputed, others that are important to the merits of the Wilkinses' claim remain contested. In reviewing the district court's denial of summary judgment on the ground of qualified immunity, this court must "assume that the version of the facts asserted by the non-moving party is correct in determining whether the denial of qualified immunity was appropriate." *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 942 (9th Cir. 2003); *see also Schwenk*, 204 F.3d at 1193, n.3.

The following facts are not in dispute. On January 11, 2001, Officer William Wilkins was assigned to work in plain clothes in the narcotics unit of the Oakland Police Department. At approximately 11:00 p.m., Officer Wilkins and other police officers were pursuing a stolen white Jeep near 90th Avenue and B Street in Oakland. During the pursuit,

the suspect, later identified as Demetrius Phillips, left the vehicle and ran away. Police officers, including Officer Wilkins, continued the chase on foot. Several transmissions regarding the theft and subsequent chase were broadcast on the main police radio channel. Appellants Scarrott and Koponen heard these transmissions, and although they were already responding to another incident, they decided to assist in the search for the car theft suspect. The dispatcher directed them to 91st Avenue and B Street, where they were to help form a perimeter of police units, sealing off the area in which the suspect was believed to be located. Upon arriving at the intersection of 91st and B, Scarrott (who was driving the patrol car) saw two men near the sidewalk on B Street between 90th and 91st Avenues. He drove toward the men, and stopped the car at an angle pointing directly to the location of the two men on the sidewalk. When the car stopped, both defendants alighted to investigate. Scarrott and Koponen had each been on the street as a patrol officer for fewer than five months, and neither was acquainted with Officer Wilkins. These are the main undisputed facts.

Accepting the Wilkinses' version of the disputed facts, the following picture emerges. Although conflicting descriptions of the suspect were broadcast on the main channel, at least two of them included the detail that he was wearing a red shirt. Scarrott noticed that one of the two men on the sidewalk was wearing a red shirt; this man was in fact Demetrius Phillips, the suspect. The other man, Officer Wilkins, was wearing a gray sweatshirt. In a voice loud enough to be audible from the corner of 90th and B, Wilkins ordered Phillips to lie on the ground. After this order was repeated, Officer Wilkins punched and kicked Phillips, who

then lay spreadeagled on the ground with his head turned to the right. Wilkins pointed his gun at Phillips, and approached him from the left side. Both Mr. Phillips' position and the manner of Wilkins' approach were described by other officers at the scene as consistent with police procedure for high risk arrests, and at least one of those officers—Officer Nash—immediately recognized that the scene he was viewing was a police arrest.

At this point, Koponen said "He's got a gun." Officer Nash, after noting that the suspect was not armed, said either "He's a cop," or "That's Will," speaking to the defendants and referring to Officer Wilkins. This statement was made from less than 30 feet away from Wilkins' position. Officer Wilkins pulled off the hood of his sweatshirt, turned toward the defendants, and said loudly "It's me, Willie." He then turned back to Phillips. Koponen was less than 15 feet away. In the Appellees' version of the incident, Koponen said only "he's got a gun"; Scarrott said nothing, and neither officer ordered Wilkins to drop the gun. The Wilkinses contend that no other warning was given.

Soon after Wilkins' statement, Scarrott and Koponen opened fire. The gunshots began seconds after the officers approached Wilkins and Phillips on the sidewalk. Both officers fired several shots in the space of a few seconds: Scarrott fired six or seven times, while Koponen fired seven shots. Wilkins was hit nine times, and came to rest on the ground approximately 12 to 15 feet away from Phillips. Wilkins' gun was found on the ground next to Phillips, an indication that he had dropped his weapon at or close to his original position when Scarrott and Koponen opened fire.

Appendix A

Appellees—Officer Wilkins' estate, his widow and son, and his parents—commenced this action, alleging violations of Wilkins' constitutional rights under the Fourth Amendment and the Due Process clauses of the Fifth and Fourteenth Amendments, as well as their own substantive due process rights. The complaint requests damages under 42 U.S.C. § 1983. After discovery had begun, all the named defendants brought a motion for summary judgment, arguing *inter alia* that they were entitled to summary judgment on the substantive due process claims, that the officers did not violate Wilkins' Fourth Amendment right to be free from excessive force, and that the officers were entitled to qualified immunity.

The district court granted the motion with regard to the substantive due process claims, but denied the motion in all other respects. The portion of the district court's order denying defendants' remaining claims held first that "triable issues of material fact existed which, if resolved in plaintiffs' favor, would support a finding that defendants used unreasonable force and thus violated the decedent's Fourth Amendment right to be free from unreasonable seizure;" second, it found that "such right was clearly established at the time of the incident and, viewing the disputed material facts in the light most favorable to the plaintiffs, it would have been clear to a reasonable officer that the conduct was unlawful in the situation confronted." Scarrott and Koponen filed a timely notice of appeal.

Appendix A

DISCUSSION

We review de novo Scarrott and Koponen's appeal from a denial of summary judgment based on qualified immunity. *See Bingham*, 341 F.3d at 945. The threshold inquiry in a qualified immunity analysis is whether the plaintiff's allegations, if true, establish a constitutional violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *see also Billington v. Smith*, 292 F.3d 1177, 1183 (9th Cir. 2002). This general evaluation of the constitutionality of the alleged conduct, however, is not sufficient; we must also determine whether the actions alleged violate a clearly established constitutional right, where 'clearly established' means that "it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*" *Saucier*, 533 U.S. at 202 (emphasis added).

Graham v. Connor, 490 U.S. 386, 388 (1989), established that the use of force is contrary to the Fourth Amendment's prohibition against unreasonable seizures, if that force is excessive as measured by objective standards of reasonableness. In *Saucier*, the Supreme Court explained that this rule is applied in the first stage of the qualified immunity analysis by inquiring whether it would be objectively reasonable for the officer to believe that the amount of force employed was required by the situation he confronted. 533 U.S. at 205 (explaining that this rule would protect a reasonable belief that the force was required, even if that belief were mistaken). That is, the first step in the analysis is an inquiry into the objective reasonableness of the officer's belief in the *necessity* of his actions, and there is no Fourth Amendment violation if the officer can satisfy this standard.

See Liston v. County of Riverside, 120 F.3d 965, 976 (9th Cir. 1997) (explaining that "it is the need for force that is at the heart of the *Graham* factors").

The second step of the analysis, which the court reaches only if it determines that the alleged conduct violates a clearly-established constitutional right, is to inquire whether the officer was reasonable in his belief that his conduct did not violate the Constitution. This step, in contrast to the first, is an inquiry into the reasonableness of the officer's belief in the *legality* of his actions. *Saucier*, 533 U.S. at 206. Even if his actions did violate the Fourth Amendment, a reasonable but mistaken belief that his conduct was lawful would result in the grant of qualified immunity. Qualified immunity thus "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). For the reasons outlined below, we do not need to reach the second step of the qualified immunity analysis to decide this case.

At the time of the shooting, and unlike the other police officers at the scene, the officers were operating under the mistaken impression that Officer Wilkins was a civilian threatening another civilian with a gun. Thus this case does not present the usual questions, where a given set of facts is known to all parties, and the issue on appeal is whether the defendants' actions were prohibited by the Constitution, or whether their mistaken belief that the conduct was lawful was in fact reasonable.

It is undisputed—and the officers do not contest—that the Fourth Amendment bars the use of deadly force against a

fellow police officer effecting an arrest, and that there could be no reasonable mistake about this prohibition. Indeed, in *Jensen v. City of Oxnard*, 145 F.3d 1078 (9th Cir.), *cert. denied*, 525 U.S. 1016 (1998), we held that "it was clearly established that police officers retain their Fourth Amendment rights," 145 F.3d at 1085, and obvious from common sense that the decedent police officer in that case "had the right to be free from an unreasonable seizure even from a fellow officer in the course of police work." *Id.* at 1086.

But it is equally uncontested that the officers did not believe that they were shooting a police officer. The crucial question, therefore, is whether their mistaken belief that Wilkins was a civilian was reasonable under the circumstances. Scarrott and Koponen could not have been reasonably mistaken as to the legality of their actions had they realized that Wilkins was a police officer. As a result, the officers' entitlement to summary judgment is determined solely by the application of the first stage of the qualified immunity analysis.

The objective reasonableness of the officers' conduct in this case turns on their mistake of fact with regard to Officer Wilkins' status and purpose at the scene that night. In turn, whether this mistake of fact was reasonable depends on which version of the facts is accepted by a jury. We emphasize that our decision here does not affirm a reflexive denial of summary judgment whenever a material issue of fact remains to be resolved, a practice which the Supreme Court rejected in *Saucier*. Even applying the step-by-step qualified immunity analysis outlined in *Saucier*, there is no question whether the officers' actions in this case violated clearly established

law. They did. The only question for resolution is whether their belief in the necessity of their actions was objectively reasonable. That is, was it reasonable for them not to understand that the person they were shooting was another police officer? Because the answer to that question depends on disputed issues of material fact, it is not a legal inquiry, but rather a question of fact best resolved by a jury. *See Santos v. Gates*, 287 F.3d 846, 855 n.12 (9th Cir. 2002) (finding it premature to decide the qualified immunity issue "because whether the officers may be said to have made a 'reasonable mistake' of fact or law may depend on the jury's resolution of disputed facts and the inferences it draws therefrom") (internal citation omitted). *See also Curley v. Klem*, 298 F.3d 271, 278 (3d Cir. 2002) (acknowledging that "the existence of disputed, historical facts material to the objective reasonableness of an officer's conduct will give rise to a jury issue," noting that the prohibition is consistent with the *Saucier* analytical framework, and citing cases from all other circuits to support the notion of a "general prohibition against deciding qualified immunity questions in the face of disputed historical facts").

This case presents a complicated factual situation, in which the issues that are likely to prove dispositive are hotly disputed. If resolved in favor of the Wilkinses, these issues of material fact would support a finding that Scarrott and Koponen violated Wilkins' clearly established Fourth Amendment right to be free from unreasonable seizure by excessive force. Where the officers' entitlement to qualified immunity depends on the resolution of disputed issues of fact in their favor, and against the non-moving party, summary judgment is not appropriate. *See Saucier*, 533 U.S. at 216

(Ginsburg, J., concurring) ("Of course, if an excessive force claim turns on which of two conflicting stories best captures what happened on the street, *Graham* will not permit summary judgment in favor of the defendant official."). We affirm the district court's denial of summary judgment.

AFFIRMED.

APPENDIX B — ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DATED AND FILED DECEMBER 17, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 01-1402 MMC

KELY WILKINS, et al.,

Plaintiffs,

v.

CITY OF OAKLAND, et al.,

Defendants

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Docket No. 27)

Before the Court is the motion of defendants City of Oakland, Tim Scarrott, and Andrew Koponen for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The motion came on regularly for hearing on December 13, 2002. Michael J. Haddad of Haddad & Sherwin and Brian T. Dunn of Cochran, Cherry, Givens, Smith & Stewart appeared for plaintiffs. Todd Boley of Erickson, Beasley, Hewitt & Wilson appeared for defendants.

Appendix B

For the reasons stated on the record at the hearing, the Court rules as follows:

1. To the extent defendants seek judgment on plaintiffs claim that defendants violated plaintiffs' substantive due process rights, defendants' motion is hereby GRANTED.

2. In all other respects, the motion is hereby DENIED. Applying the test set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), the Court finds:

a. Triable issues of material fact exist which, if resolved in plaintiffs' favor, would support a finding that defendants used unreasonable force and thus violated the decedent's right under the Fourth Amendment to be free from unreasonable seizure.

b. Such right was clearly established and, viewing the disputed material facts in the light most favorable to plaintiffs, it would have been clear to a reasonable officer that his conduct was unlawful in the situation confronted.

This order terminates Docket No. 27.

IT IS SO ORDERED.

Dated: DEC 17 2002

s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JANUARY 14, 2004

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-15086

KELY WILKINS, Individually and as the Successor in Interest to Decedent William Alberto Wilkins; WILLIAM ALBERTO WILKINS, Individually; THE ESTATE OF WILLIAM WILKINS; WILLIAM RANDOLPH WILKINS, a minor, by and through his Guardian Ad Litem, Kely Wilkins; FERNANDO WILKINS, Individually; JOSEFINA WILKINS,, Individually,

Plaintiffs - Appellees,

v.

CITY OF OAKLAND,

Defendant,

and,

TIM SCARROT, individually, and his official capacity as a Police Officer for the City of Oakland; ANDREW KOPONEN, individually, and in his official capacity as a Police Officer for the City of Oakland,

Defendants - Appellants.

Appendix C

D.C. No. CV-01-01402-MMC
Northern District of California,
San Francisco

ORDER

Before: HUG, B. FLETCHER, and TASHIMA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Tashima votes to deny the petition for rehearing en banc and Judges Hug and B. Fletcher so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

(3)

SUPREME COURT, U.S.
FILED
JUL 12 2004
OFFICE OF THE CLERK

No. 03-1517

IN THE

Supreme Court of the United States

TIM SCARROTT and ANDREW KOPONEN,

Petitioners,

v.

KELY WILKINS, Individually and as the Successor in Interest to Decedent William Alberto Wilkins; WILLIAM ALBERTO WILKINS, Individually; THE ESTATE OF WILLIAM WILKINS; WILLIAM RANDOLPH WILKINS, a minor, by and through his Guardian Ad Litem, Kely Wilkins,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

JOHNNIE L. COCHRAN, JR.
BRIAN T. DUNN
COCHRAN, CHERRY, GIVENS, SMITH & STEWART
4929 Wilshire Boulevard
Suite 1010
Los Angeles, CA 90010

MICHAEL J. HADDAD
Counsel of Record
JULIA SHERWIN
HADDAD & SHERWIN
505 Seventeenth Street
Oakland, CA 94612
(510) 452-5500

Counsel for Respondents

188404

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the District Court's denial of qualified immunity to Petitioner police officers who shot and killed a fellow officer while that officer was obviously effecting an arrest and had identified himself to Petitioners, where Petitioners failed to give a feasible warning before shooting, where Petitioners continued to shoot after the officer clearly was no longer armed, and where other officers at the scene testified that no reasonable police officer would have used deadly force under those circumstances.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
Statement of Facts	3
Reasons for Denying the Petition	17
A. The Court of Appeals Appropriately Analyzed Petitioners' Claim of Qualified Immunity and Correctly Concluded that Petitioners Are Not Entitled to that Affirmative Defense	17
B. The Court of Appeals Decision in this Case Is Not in Conflict with the Decision of Any Other United States Court of Appeals on the Same Important Matter	25
Conclusion	27

TABLE OF CITED AUTHORITIES

Page

Cases:

Behrens v. Pelletier, 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1995) 2, 18

Chuman v. Wright, 960 F.2d 104 (9th Cir. 1992) .. 2

Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999) 3

Curley v. Klem, 298 F.3d 271 (3d Cir. 2002) 24, 26

Curnow v. Ridgecrest Police, 952 F.2d 321 (9th Cir. 1991), *cert. denied*, 506 U.S. 972 (1992) 20

Foster v. Arcata Associates, Inc., 772 F.2d 1453 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986) 3

Garrity v. New Jersey, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967) 21

Harris v. Roderick, 126 F.3d 1189 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998) 20

Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) 24, 27

Jeffers v. Gomez, 267 F.3d 895 (9th Cir. 2001) 18

Cited Authorities

Page

Jensen v. City of Oxnard, 145 F.3d 1078 (9th Cir. 1998), *cert. denied*, 525 U.S. 1016 (1998) ..21, 24, 26

Johnson v. Jones, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995) 18

Kennedy v. Allied Mutual Ins. Co., 952 F.2d 262 (9th Cir. 1991) 3

Malley v. Briggs, 475 U.S. 335, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986) 20

Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) 18, 19

Saucier v. Katz, 533 U.S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001) ..... *passim*

Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985) 20, 23, 24

United States v. Arvizu, 534 U.S. 266, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002) 23

Wilkins v. City of Oakland, 350 F.3d 949 (9th Cir. 2003) ..... *passim*

Cited Authorities

Page

United States Constitution:

Fourth Amendment 1, 20, 21, 26

Fourteenth Amendment 1, 2

Statute:

42 U.S.C. § 1983 1

STATEMENT OF THE CASE

This civil rights case is unique in that police officers are on both sides. William Wilkins, a seven-year veteran of the Oakland, California, police department, was shot and killed by two rookie officers who failed to follow their training and orders. Defendants-Petitioners shot within seconds of seeing Officer Wilkins arresting the suspect identified over their police radios.[1] Petitioners failed to recognize the obvious and failed even to give a warning before shooting.

The two other police officers who witnessed this shooting both testified that no reasonable officer would have used deadly force under the circumstances.

Officer Wilkins' wife, young son, and his parents brought this action against police officers Tim Scarrott and Andrew Koponen and the City of Oakland pursuant to 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments to the United States Constitution. Pursuant to stipulation and order of the District Court, discovery was deferred on Plaintiffs-Respondents' claims of municipal liability and damages until after the District Court decided a motion for summary judgment brought by Petitioners Scarrott and Koponen. ER 464-468.[2]

---

1. Defendants-Petitioners Scarrott and Koponen hereinafter will be referred to as "Petitioners."

2. Plaintiffs-Respondents hereinafter will be referred to as "Respondents." Respondents will refer to Appellants' Excerpts of Record filed with the Court of Appeals for the Ninth Circuit as "ER," Appellees' Supplemental Excerpts of Record on Appeal as "SER," and to items in the Court Record ("CR") by their District Court docket entry number.

After Petitioners' motion for summary judgment, the District Court dismissed the claims of Officer Wilkins' parents for violation of the Fourteenth Amendment. The District Court denied the remainder of Petitioners' motion, including their request for qualified immunity, and explained in its Order, filed December 17, 2002:

Applying the test set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), the Court finds:

a. Triable issues of material fact exist which, if resolved in Respondents' favor, would support a finding that Defendants used unreasonable force and thus violated the decedent's right under the Fourth Amendment to be free from unreasonable seizure.

b. Such right was clearly established and, viewing the disputed material facts in the light most favorable to Plaintiffs, it would have been clear to a reasonable officer that his conduct was unlawful in the situation confronted.

ER 495-496.

Petitioners Scarrott and Koponen filed an appeal from that order with the Ninth Circuit Court of Appeals on January 13, 2003. Thereafter, Respondents filed with the District Court a motion to certify Petitioners' appeal as frivolous. CR 51. *See Chuman v. Wright*, 960 F.2d 104 (9th Cir. 1992); *Behrens v. Pelletier*, 516 U.S. 299, 310, 116 S. Ct. 834, 841, 133 L. Ed. 2d 773 (1995). The District Court denied that motion in an order dated April 18, 2003. CR 67.

However, in the hearing on Respondents' Motion to Certify Petitioners' Appeal as Frivolous held on March 28,

2003, the District Court further explained the basis for its denial of qualified immunity, including the disputed issues of fact compelling that ruling. *See* SER 6-8.

On November 20, 2003, the Ninth Circuit Court of Appeals affirmed the District Court's denial of qualified immunity in a decision reported at 350 F.3d 949 (9th Cir. 2003).

STATEMENT OF FACTS

Oakland Police Officer William Wilkins had just turned 29 when he was taken from an adoring wife and young son, as well as from his large family, many friends, and fellow officers. Oakland Police Chief Richard Word eulogized that Officer Wilkins' "energy, passion and zest" for his job and his life were an "inspiration" for other officers. ER 446.

Yet, in this case brought to vindicate Officer Wilkins' civil rights, Petitioners persist in ignoring the tapestry of facts supporting Respondents' claims.[3] While conceding that all

3. For instance, Petitioners' attorneys crafted one-sided declarations for all of the officers involved in this incident instead of using the officers' deposition transcripts which tell a more complete, and different, story.

As this Court has found, the lower courts have held "with virtual unanimity" that a party cannot 'create' an issue of fact by an affidavit that contradicts his prior deposition testimony. *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999). *See also Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991). Likewise, Petitioners here cannot *negate* the numerous questions of fact that remain in this case, by filing declarations that contradict their sworn deposition testimony. Indeed, courts can disregard declarations that contradict prior sworn deposition testimony. *Foster v. Arcata Associates, Inc.*, 772 F.2d 1453, 1462 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986) (when declaration contradicted prior deposition testimony "we consider as credible only appellant's deposition testimony on this subject").

disputed facts and reasonable inferences must be resolved in Respondents' favor for this question of qualified immunity, Petitioners still dispute or fail to mention many of the following facts in their Petition for a Writ of Certiorari.

On January 11, 2001, Officer William Wilkins was assigned to work in plainclothes in the narcotics unit of the Oakland Police Department. Around 11:00 p.m., Officer Wilkins and other veteran officers were pursuing a stolen white Jeep near 90th Avenue and B Street. At some point, the suspect in the Jeep got out and ran away, pursued on foot by police officers. These events were broadcast over the main police radio channel, including a description of the suspect wearing a "tan top, tan jacket, ***red shirt***, tan pants." ER 131, line 6 (emphasis added).

At that time, Petitioner officers Tim Scarrott and Andrew Koponen each had only about 4 months experience as patrol officers since finishing their field training. ER 228 (Scarrott dep. p. 84:16-18); ER 264 (Koponen dep. p. 36:14-18); ER 266 (Koponen dep. p. 42:13-19). Despite their inexperience, Petitioners Scarrott and Koponen were partners. ER 266 (Koponen dep. pp. 42-44).

At the time that the pursuit of the stolen Jeep was broadcast, Petitioners Scarrott and Koponen were already handling a serious incident involving a woman whose husband had threatened her with a gun and escaped by car. ER 267 (Koponen dep. p. 47:5-48:15). Petitioners Scarrott and Koponen abruptly left before finishing that call to get involved in the pursuit of the suspect who had stolen the Jeep. ER 234 (Scarrott dep. pp. 106:15-107:10); ER 267-268 (Koponen dep. pp. 49:14-50:16). Petitioner Scarrott believed they were "2 or 3 miles" away. ER 234 (Scarrott dep. p. 106:6-8).

While driving "code 3" with their lights and sirens on to the area of the foot pursuit, both Petitioners learned that the suspect being chased was wearing a **red** shirt. ER 268 (Koponen dep. p. 51:7-14). The dispatcher informed Petitioners that police were forming a "perimeter," basically to seal off the several block area where the suspect was believed to be.

Petitioners Scarrott and Koponen knew from the radio traffic and from their training concerning "perimeters" that there were many other police officers involved in this pursuit. ER 58, ¶ 6; ER 237 (Scarrott dep. pp. 117:1-120:4). Petitioners did not know whether some of those other officers may be undercover or in plain clothes. ER 237 (Scarrott dep. p. 117). Petitioners were able to observe other police cars in the area of 91st Avenue and B Street. ER 238 (Scarrott dep. pp. 121:21-122:18); ER 269 (Koponen dep. p. 57:5-20).

Petitioners were directed to go to the intersection of 91st Avenue and B Street. ER 112, ¶ 6; ER 58, ¶ 7. However, Petitioners were not happy with that direction, since the suspect was last seen headed away from that location. ER 279 (Koponen dep. pp. 58:2-59:23). At 91st and B, as Petitioner Koponen began to get out of the passenger side of the police car, Petitioner Scarrott accelerated to drive away from the location where they had been told to go. *Id.*

Petitioners Scarrott and Koponen saw two men near the sidewalk on B Street, closer to the corner of 90th. ER 239 (Scarrott dep. p. 125:11-22); ER 270 (Koponen dep. p. 60:12-19). Petitioner Scarrott noticed that one of the men was wearing a **red** shirt. ER 239 (Scarrott dep. p. 126:4-10); ER 325 (McClure dep. p. 24:23-25). Petitioners went there. *Id.*

The two men that Petitioners saw were Officer Wilkins and the suspect, Demetrius Phillips. At this time, Officer Wilkins was in foot pursuit of the suspect in the red shirt. Officer Wilkins saw the suspect coming down the driveway from a house near the corner of 90th and B, and confronted the suspect. ER 348 (Phillips Dep, 31-32).

Petitioners Scarrott and Koponen drove up quickly to the two men and parked diagonally in the street with their headlights illuminating the men. ER 240 (Scarrott dep. p. 129:1-4); ER 270 (Koponen dep. p. 61:7-10). With the headlights, a streetlight directly overhead, and exterior lights on the nearby house, everyone agrees that the lighting in the area of the shooting was "as good as it gets." ER 326 (McClure Dep., p 25:7-16); ER 240 (Scarrott Dep., p. 129:5-17); ER 280 (Koponen Dep., p. 100:22-24); ER 222 (Nash Dep., p. 58:10-20).

As Petitioners Scarrott and Koponen drove away from their assigned location to where the two men were on B Street near 90th, Police Officer Torrey Nash was at his perimeter position, the corner of 90th and B, standing in the "V" of his door.[4] ER 302-303 (Nash Dep., pp. 32:10-33:25). Police Officer Sean McClure was standing in the "V" of his door at 91st and B. ER 324-325 (McClure Dep. pp. 20:13-21:18).

Officer Nash testified that from his location at the corner, he clearly heard a voice on B Street commanding, "Lay on the ground." ER 303 (Nash Dep., 35:23-36:15). Although he did not recognize the voice, he immediately recognized that whoever gave that command was a police officer, based on the tone of the command. ER 307 (Nash Dep. pp. 49:10-

4. The "V" of the door is the space between the open car door and the car. Police use this as a position of cover to limit their exposure to threats or gunfire. ER 303 (Nash Dep. 33:13-34:6).

50:11). Demetrius Phillips described that command as given in a manner that was "forceful, like he was giving me an order." ER 368 (Phillips Dep., 113:23-25). Police are trained to use their voice in this manner. ER 307 (Nash Dep. pp. 49:10-50:11). A jury could conclude that Petitioners heard, or should have heard, this police command as well.

Officer Nash got in his car, drove to where the command came from, and saw Officer Wilkins and Demetrius Phillips. Officer Nash was going to assist in what was obviously an officer making an arrest. Petitioners' police car was already there. ER 304 (Nash Dep. 37:2-40:8). As Officer Nash began walking up to assist Officer Wilkins, ***from a distance of about 30 feet***, he saw the exact same snapshot that Petitioners saw:

> Mr. Phillips was laying on the ground with his arms extended all the way away from his body, his legs were spread apart, and his head was turned to the right, and Officer Wilkins was approaching him from his left side, which is consistent with our handcuffing in a high risk situation.
>
> * * *
>
> [T]he manner that Mr. Phillips was laying on the ground was textbook on how we perform a high risk, high risk arrest, detention or enforcement stop, as far as the position of his extremities and his head.
>
> The position that Officer Wilkins was standing in, again, offset to the left, and a matter of steps, three or four steps away from him, is also consistent with that.

ER 304 (Nash Dep. 40:4-8), ER 306 (Nash Dep. 46:11-47:22). Officer Nash emphasized, **"That alone would make**

another – a reasonable officer in my opinion, you know, come to the conclusion that this is an officer down here." ER 306 (Nash Dep. 47:1-3).

Officer Nash saw Petitioners Scarrott and Koponen standing outside their car. ER 304 (Nash Dep., 39:3-40:8). After Officer Nash had taken only a few steps toward Wilkins, he heard Scarrott or Koponen say "He's got a gun." *Id.* Officer Nash went back to the "V" of his door and drew his own gun. Believing that it was obvious to Petitioners that Wilkins was an officer making an arrest, Officer Nash looked to see whether the suspect had a gun in his hands. Seeing no gun in the suspect's hands, **Officer Nash assured Petitioners, "He's a cop," or "That's Will," and began walking towards Officer Wilkins again.** ER 305-306 (Nash Dep. 43:12-45:21). Officer Nash was less than 30 feet away from Officer Wilkins when he said this. ER 304 (Nash Dep. 40:4-8).

Officer Nash testified at his deposition that he made that statement, "He's a cop," or "That's Will," because he wanted Petitioners to know that Wilkins was a police officer. ER 306 (Nash Dep. 45:15-21). "And," Officer Nash explained, "I also made the statements because I never worked with these two other officers. And I thought that they would understand, you know, another officer when they saw him by his demeanor and his mannerisms." *Id.*

In crafting declarations to support their motion for summary judgment, Petitioners carefully avoided testimony like this from Officer Nash:

> **Q: As you sit here today, would you agree with the statement that a reasonable police officer**

should have known that Officer Wilkins was a police officer?

A: Yes.

ER 306 (Nash Dep., 47:23-48:1).

The next thing Officer Nash heard was gunshots. ER 306 (Nash Dep., 48:2-5). Officer Nash thought at that moment that someone other than Petitioners Scarrott and Koponen must be shooting, because "I didn't see a threat. I saw, again, I saw Phillips was in a position of vulnerability; I saw that Officer Wilkins had reasonable control over him; and I, in fact, was approaching to assist him. I didn't see a threat." ER 308 (Nash Dep., 55:4-16).

Officer Sean McClure, standing in the "V" of his door at 91st and B, heard the first gunshot and turned to get a clear view of the shooting. He was approximately 65 feet away from Wilkins and Phillips. ER 325 (McClure Dep., 23:17-22). Only about 5 to 10 seconds had passed from when he saw Petitioners Scarrott and Koponen pull up in their car to when the shots rang out. ER 325 (McClure Dep., 22:24-23:2).

Officer McClure saw Phillips laying on the ground, and Officer Wilkins had dropped his gun and was "retreating into the yard or kind of falling back" with nothing in his hands. ER 326 (McClure Dep., 27:12-25). As Officer Wilkins was being shot, he was moving away from Phillips with his arms "out to his side." ER 329 (McClure Dep., 37:6-25). Officer Wilkins did not have any gun in his hands. *Id.* Three to five seconds elapsed from the first shot to the last shot, while Wilkins retreated without any gun. ER 326 (McClure Dep., 28:16-19).

Officer McClure also observed Petitioner Scarrott move from his position of cover in the "V" of his door, toward Officer Wilkins, while Scarrott was shooting Wilkins. ER 326, 328 (McClure Dep., 27:18-23, 33:5-35:7). Petitioner Scarrott obviously was not in fear for his own safety; *he was on the attack.*

Officer McClure never saw Officer Wilkins make any kind of threatening gesture toward anyone. ER 329 (McClure Dep., 38:6-13).

> **Q: At any time that evening, did you see Officer Wilkins take any actions which would lead a reasonable police officer to believe that Officer Wilkins posed a threat of violence to any person?**
>
> **A: From what I saw, no.**

Id.

Right after the shooting, Officer McClure observed that Officer Wilkins was laying about 12-15 feet away from Phillips and from his own gun – the same distance Wilkins traversed as he was being shot. ER 329 (McClure Dep., 37:2-38:2). Officer Wilkins' gun was found on the ground next to where Phillips was laying. *Id.*; ER 61, ¶ 22; ER 114, ¶ 17 (referring to the location of Phillips at "item 13," which is where Wilkins' gun was found, as set forth in the diagram at ER 124). Officer Wilkins' gun "wasn't close to where Officer Wilkins" came to rest. ER 328 (McClure Dep., 19-22).

Petitioners Scarrott and Koponen had been trained that when they decide to use deadly force, they may only shoot as long as the threat exists, and that the need for every shot must be evaluated independently. ER 216 (Scarrott Dep., 35:3-38:12); ER 264 (Koponen Dep., 34:5-19).

Officer McClure heard the shots fired continuously, with no pause. ER 326 (McClure Dep., 25:17-21). Petitioner Scarrott fired his 6 or 7 shots in 'one continuous burst,' lasting 3-4 seconds as he watched Officer Wilkins' "arm fall and his body fall to the ground." ER 246, 244 (Scarrott Dep, 156:5-25, 147:22-149:6). Petitioner Scarrott does not recall deciding independently to fire more than once. ER 246 (Scarrott Dep., 154:2-7). In fact, Petitioner Scarrott initially thought he had fired only twice. ER 244 (Scarrott Dep., 148:23-149:1).

Similarly, Petitioner Koponen fired his 7 shots in one continuous burst. ER 276 (Koponen Dep., 82:13-83:20). He has "no knowledge" as to why he fired seven shots. ER 276 (Koponen Dep., 84:3-5). A jury can find that Petitioners fired in panic, with no independent assessment of the need for each shot.

The testimony of the suspect, Demetrius Phillips, is consistent with what Officers Nash and McClure recall. When Phillips encountered Officer Wilkins, Wilkins loudly ordered him, "a couple of times," to get on the ground. ER 348, 349 (Phillips Dep., 32:7-13, 36:8-12). When Phillips responded, "Who the fuck are you?" Officer Wilkins took him to the ground with a punch and a kick. ER 348-349 (Phillips Dep., 32:11-34:5). Then, Officer Wilkins pointed his gun at Phillips, who was on the ground. ER 349 (Phillips Dep., 34:3-7).

Next, Phillips heard, "He's got a gun." ER 350 (Phillips Dep., 39:8-16). Then, Officer Wilkins "pulled off the hoodie[5] and he looked back and he was like, **'It's me, Willie.'** And he turned back around and they said, 'He's got a gun,' and they shot him." ER 352 (Phillips Dep., 46:12-47:15). When

5. Slang for the hood of a hooded sweatshirt, like Officer Wilkins was wearing.

Officer Wilkins removed his hood, turned around toward Petitioners, and said, **"It's me, Willie,"** "he said it loud." ER 352 (Phillips Dep., 48:21-25). Petitioner Koponen was only 10-15 feet away. ER 272 (Koponen Dep., 68:12-69:6). A reasonable officer in Petitioner Koponen's position would have seen and heard Officer Wilkins identify himself.

Consistently with Phillips' account, Petitioner Scarrott also recalls Officer Wilkins turning to look at Petitioners before Petitioners began shooting. ER 243 (Scarrott Dep., 143:4-144:7). Officer Nash is less sure, but believes Officer Wilkins may have turned toward Petitioners, then turned back, before they shot him. ER 309 (Nash Dep., 59:13-60:6).

Petitioner Scarrott claims that Petitioners yelled warnings to Officer Wilkins to "Freeze" and "Drop the gun," four or five times each, which he claims Officer Wilkins ignored before they shot him. ER 242-243 (Scarrott Dep., 139:5-141:5); ER 59 ¶ 12.

However, Petitioner Scarrott's claim that he and Petitioner Koponen gave any command or warning, or said anything other than "He's got a gun," is sharply disputed by his partner and fellow Petitioner. Petitioner Koponen testified that the ***only*** thing he said was "Tim, he's got a gun." ER 275 (Koponen Dep., 79:2-80:8). Petitioner Koponen never said, "Freeze," or anything else. *Id.* ***Petitioner Scarrott never said anything at all.*** *Id.* ***Nobody ever said "drop the gun."*** *Id.*

Likewise, Demetrius Phillips only heard someone say "He's got a gun," and never heard Petitioners give any warning or say anything else. ER 350 Phillips Dep., 41:5-16); ER 106-107 (Phillips Statement). Phillips "definitely" only heard, "He's got a gun." Nobody said, "police." *Id.*

Officer McClure did not hear Petitioners say anything before shooting. ER 325 (McClure Dep., 23:25-24:9). And the only thing that Officer Nash is sure that he heard Petitioners say is, "He's got a gun." Officer Nash "can't be for sure" about whether Petitioners said anything else. ER 305 (Nash Dep., 41:2-25). Officer Nash did not hear anyone say "Drop it." *Id.*

Petitioners now claim that "a warning was not feasible." Petition, p. 23. Commands and warnings were clearly feasible, since Petitioner Scarrott offers disputed, and unsupported, testimony that he gave repeated commands before shooting. ER 242 (Scarrott Dep., 139:8-140:14). **Thus, Petitioners cannot now claim that they had no time to give any commands or warnings.** And in any event, a jury could conclude that any quickness in the situation was due to Petitioners' premature decision to shoot in panic. This did not need to be, and was not, a "split second" situation. ER 397-398, ¶¶ 26-27.

Petitioner Scarrott has no support for his claim that he said *anything* before shooting Officer Wilkins. Petitioner Koponen disputes Scarrott's claim that he said anything. ER 275 (Koponen Dep., 79:2-80:8). Neither officer made any commands or gave any warning before shooting. Yet, Officer Wilkins' alleged failure to heed the disputed "commands" was the only objective reason given by Petitioner Scarrott for shooting Officer Wilkins.

Petitioner Scarrott offers his current subjective feelings for why he decided to use deadly force, including what he can "imagine," was "wishing," "hoped," or what he imagines the suspect might have been feeling. ER 59 (Scarrott Declaration, ¶¶ 12, 14). However, Petitioner Scarrott's feelings and speculation are not the basis for an objectively

reasonable decision to use deadly force. Petitioner Scarrott heard Petitioner Koponen shoot first. ER 245-246 (Scarrott Dep., 152:20-153:6). Although Petitioner Scarrott claims to have made an independent decision to shoot, a jury could conclude otherwise.

Petitioner Koponen claims that he decided to shoot in response to a "movement" that Officer Wilkins made. Yet, Petitioner Koponen cannot articulate any movement whatsoever on the part of Officer Wilkins. ER 274 (Koponen Dep., 74:3-76:1). Indeed, when faced with the snapshot of Officer Wilkins holding the suspect at gunpoint, Petitioner Koponen did not shoot – consistent with the conclusion that deadly force was not justified at that time. It was only in response to some phantom "movement" by Officer Wilkins, seen by no one else, and which Petitioner Koponen cannot objectively describe, that Petitioner Koponen decided to shoot. A jury can discredit Petitioners' subjective, unsupported attempts to justify their use of deadly force.

Two highly experienced and qualified police practices experts have reviewed this matter and concluded that the use of deadly force by Petitioners Scarrott and Koponen was objectively unreasonable under these circumstances, and contravened generally accepted police practices.

Lou Reiter, the former Deputy Chief of Police of the Los Angeles Police Department and now an expert and consultant for numerous police departments, including the United States Department of Justice, has concluded that Petitioners' use of deadly force "was contrary to reasonable police action, generally accepted police practices and, in my opinion, was objectively unreasonable." ER 393, ¶ 9 (Declaration of Lou Reiter). Both the initial decision to use deadly force and the subsequent shots when Officer Wilkins

had dropped his gun were objectively unreasonable. ER 393-397, ¶¶ 9-24. Further, this was not a situation requiring "split second" decisions, nor was it "confusing" such that reasonable officers would behave rashly. These circumstances were typical of "encounters frequently addressed by officers in an urban setting." ER 397-398, ¶¶ 25-27. This was exactly the type of situation that police are trained to handle, and that reasonable police officers do handle, without tragedy on a daily basis. *Id.*

D.P. Van Blaricom is the former Chief of Police for the City of Bellevue, Washington, with 29 years in continuous police service. After a detailed and specific evaluation of the circumstances, Mr. Van Blaricom concludes that Petitioners' use of deadly force was not justified at any time. ER 421-426, ¶¶ 5-7 (Declaration of D.P. Van Blaricom). Further, Mr. Van Blaricom finds a factual dispute as to whether Petitioners gave Officer Wilkins a warning, which was feasible, before shooting. ER 424-425, ¶ 6.

Petitioners Scarrott and Koponen were looking for action that night, and unfortunately, found some. They failed to make reasonable decisions to learn more about the scene in which they thrust themselves before deciding to use deadly force. They failed to give a reasonable warning to Officer Wilkins before shooting him. They failed to assess the need for each gunshot independently, instead firing in a "continuous burst" over a several second period even after Officer Wilkins had dropped his gun.

Fundamentally, Petitioners failed to observe, recognize, or heed, the numerous signs that they (and Officers Nash and McClure) were not encountering "an execution," but merely another officer effecting a high risk arrest. As Officers Nash and McClure testify, no reasonable officer under these circumstances would have used deadly force.

And as the District Court explained its denial of qualified immunity, "Nobody can dispute the fact that the law is clearly established that you can't go blowing away a police officer making an arrest." SER 6. At the hearing on Plaintiff's Motion to Certify Petitioners' Appeal as Frivolous, the District Court further explained:

> . . . Although I did make reference to the "It's me, Willie," it has to be taken in the context of all the other facts which are either undisputed or in dispute.
>
> The Plaintiff has presented a great deal of evidence on the issue of whether the Defendant officers should have known that Officer Wilkins was in fact a police officer, based on the manner in which he was holding the person at gun point, his own stance, the spread eagle position of the person under arrest, the red shirt that was consistent with what went over the broadcast, the fact of where they were coming from, the fact that other officers recognized immediately this was a police arrest, the fact he didn't run away when police officers came right up – he kept on in the same behavior – the fact that he turned toward them, identified himself, and no warning – if he did identify himself – no warning at that point was given.
>
> You have a man turning away from the activity that they're concerned about, turning toward the officers, identifying himself both facially and verbally, and at that point, if he said that, no one says, "Drop it. We said, drop it." They put nine bullets in him at that point.

> And under these circumstances, and again, as I say – you're shaking your head – but we weren't there, and all of this hasn't been played out to a jury. So we have fragments. We don't know how fast this went down, what was the speed at which the behavior occurred, who said what, when, did another officer say, "It's a police officer. It's Willie," and appear unconcerned about the fact that he was holding someone at gun point.
>
> There are so many facts here, both disputed and undisputed, that bear on the reasonableness of the perception of whether this was or wasn't a police officer, and that is why I am saying that I think those issues have to be determined by a jury. It's obvious that if he was a police officer, you don't shoot him.

SER 6-8.

REASONS FOR DENYING THE PETITION

A. The Court of Appeals Appropriately Analyzed Petitioners' Claim of Qualified Immunity and Correctly Concluded that Petitioners Are Not Entitled to that Affirmative Defense

The Court of Appeals correctly applied the qualified immunity test adopted by this Court in *Saucier v. Katz*, 533 U.S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001), ultimately holding:

> This case presents a complicated factual situation, in which the issues that are likely to prove dispositive are hotly disputed. If resolved in favor of the Wilkinses, these issues of material

> fact would support a finding that Scarrott and Koponen violated Wilkins' clearly established Fourth Amendment right to be free from unreasonable seizure by excessive force.

350 F.3d at 956.

However, before addressing the qualified immunity issue on the merits, the Court of Appeals had to address its jurisdiction over this interlocutory appeal. The Court of Appeals held that since interlocutory appellate review of a denial of qualified immunity is generally limited to issues of law and "does not extend to claims in which the determination of qualified immunity depends on disputed issues of material fact," *Jeffers v. Gomez*, 267 F.3d 895, 903 (9th Cir. 2001), *citing Behrens v. Pelletier*, 516 U.S. 299, 306, 133 L. Ed. 2d 773, 116 S. Ct. 834 (1996), "[t]he issue for decision is thus whether the officers are eligible for qualified immunity under the Wilkinses' version of the disputed facts." 350 F.3d at 951-952.[6]

---

6. *See also Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995). Additionally, as this Court noted in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 150-151, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), in deciding a motion for summary judgment,

> [T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. [ ] Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. [ ] Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. [ ] That is, the court

(Cont'd)

Accordingly, the Court of Appeals "assum[ed] that the version of events offered by the non-moving party is correct," 350 F.3d at 951, just as Petitioners insist all courts of appeal should do under these circumstances. *See* Petition, pp. 10-11.

The Court of Appeals next analyzed the case using the *Saucier* two-step analysis. The Court of Appeals recognized,

> The threshold inquiry in a qualified immunity analysis is whether the plaintiff's allegations, if true, establish a constitutional violation. *Saucier v. Katz, 533 U.S. 194, 201, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001)*; *see also Billington v. Smith, 292 F.3d 1177, 1183 (9th Cir. 2002)*. This general evaluation of the constitutionality of the alleged conduct, however, is not sufficient; we must also determine whether the actions alleged violate a clearly established constitutional right, where 'clearly established' means that "it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier, 533 U.S. at 202*.

350 F.3d at 954. The Court of Appeals also recognized that "[q]ualified immunity thus 'provides ample protection to all

---

(Cont'd)

> should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses.

Reeves, 530 U.S. at 150-151 (internal citations and quotations omitted).

but the plainly incompetent or those who knowingly violate the law.'" 350 F.3d at 955, *citing Malley v. Briggs*, 475 U.S. 335, 341, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986).

The Court of Appeals pointed out that under the second step of the *Saucier* analysis, "Even if [an officer's] actions did violate the Fourth Amendment, a reasonable but mistaken belief that his conduct was lawful would result in the grant of qualified immunity." 350 F.3d at 955.

It is here that the unique factual presentation of this case required the Court of Appeals to consider Petitioners' assertion of qualified immunity in a manner appropriate for the facts of this case. For this is not the usual excessive force case where the conduct of the decedent, or the manner and amount of force used by officers, are substantially in dispute. In this case, it is obvious and undisputed that the Fourth Amendment forbids the use of deadly force by a police officer 'in the situation Petitioners confronted' – i.e. against another officer engaged in a lawful arrest – and no reasonable officer could be mistaken about that prohibition.[7]

---

7. "There can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Curnow v. Ridgecrest Police*, 952 F.2d 321 (9th Cir. 1991), *cert. denied*, 506 U.S. 972 (1992), *citing Tennessee v. Garner*, 471 U.S. 1, 7, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). "[S]uch force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Garner*, 471 U.S. at 3. "Moreover, whenever practicable, a warning must be given before deadly force is employed." *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998), *citing Garner*, 471 U.S. at 12.

"It has long since been established that police officers are not relegated to a watered-down version of constitutional rights." (Cont'd)

The Court of Appeals explained:

> . . . For the reasons outlined below, we do not need to reach the second step of the qualified immunity analysis to decide this case.
>
> At the time of the shooting, and unlike the other police officers at the scene, the officers were operating under the mistaken impression that Officer Wilkins was a civilian threatening another civilian with a gun. Thus this case does not present the usual questions, where a given set of facts is known to all parties, and the issue on appeal is whether the defendants' actions were prohibited by the Constitution, or whether their mistaken belief that the conduct was lawful was in fact reasonable.
>
> It is undisputed—and the officers do not contest—that the Fourth Amendment bars the use of deadly force against a fellow police officer effecting an arrest, and that there could be no reasonable mistake about this prohibition. Indeed, in *Jensen v. City of Oxnard, 145 F.3d 1078 (9th Cir.), cert. denied, 525 U.S. 1016, 142 L. Ed. 2d*

(Cont'd)

Jensen v. City of Oxnard, 145 F.3d 1078, 1085 (9th Cir. 1998), *cert. denied*, 525 U.S. 1016 (1998), *citing Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967). In *Jensen*, another 'friendly fire' police shooting case, the Ninth Circuit held that where, "in the turmoil of events, [the defendant officer] mistook [decedent Officer Jensen] for a gun-wielding occupant of the premises and shot him to death," the decedent officer's estate could assert a Fourth Amendment claim from which there was no qualified immunity. 145 F.3d at 1082, 1085-1087.

> *449, 119 S. Ct. 540 (1998)*, we held that "it was clearly established that police officers retain their Fourth Amendment rights," *145 F.3d at 1085*, and obvious from common sense that the decedent police officer in that case "had the right to be free from an unreasonable seizure even from a fellow officer in the course of police work." *Id. at 1086.*
>
> But it is equally uncontested that the officers did not believe that they were shooting a police officer. The crucial question, therefore, is whether their mistaken belief that Wilkins was a civilian was reasonable under the circumstances. Scarrott and Koponen could not have been reasonably mistaken as to the legality of their actions had they realized that Wilkins was a police officer. As a result, the officers' entitlement to summary judgment is determined solely by the application of the first stage of the qualified immunity analysis.
>
> The objective reasonableness of the officers' conduct in this case turns on their mistake of fact with regard to Officer Wilkins' status and purpose at the scene that night. In turn, whether this mistake of fact was reasonable depends on which version of the facts is accepted by a jury.

350 F.3d at 955.

Petitioners fixate on the first sentence of that section of the opinion, out of context. Still, the Court of Appeals was careful to point out:

> **We emphasize that our decision here does not affirm a reflexive denial of summary judgment**

> **whenever a material issue of fact remains to be resolved, a practice which the Supreme Court rejected in *Saucier*. Even applying the step-by-step qualified immunity analysis outlined in *Saucier*, there is no question whether the officers' actions in this case violated clearly established law. They did.**

Id. (emphasis added).

Applying any test for qualified immunity, and taking the facts in the light most favorable to Respondents, both lower courts properly concluded that reasonable officers would have refrained from shooting Officer Wilkins, without warning, where Officer Wilkins was arresting the very suspect police had been chasing, using easily recognizable police techniques, under circumstances where any reasonable officer would have recognized that Officer Wilkins was a police officer, after Officer Nash told Petitioners, "He's a cop," or "That's Willie," and after Officer Wilkins stopped what he was doing, turned toward Petitioners, removed his hood, and said loudly, ***"It's me, Willie."*** Even if Petitioners failed to perceive these facts, reasonable officers would have recognized these facts under the totality of the circumstances.[8]

---

8. Police must consider the "totality of the circumstances" when deciding whether deadly force is justified. *Garner*, 471 U.S. 1, 8-9 (1985) ("the question was whether *the totality of the circumstances* justified a particular sort of search or seizure"). Consideration of the totality of the circumstances "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002).

(Cont'd)

This was not a situation requiring split-second decision making. ER 397-398 (Decl. of Lou Reiter, ¶¶ 25-27).[9]

Reasonable officers would have had "fair notice" that shooting Officer Wilkins under these circumstances would violate clearly established law.[10] The law governing Petitioners' conduct was particularly well-established in the Ninth Circuit given the earlier police 'friendly fire' case, *Jensen v. City of Oxnard*, 145 F.3d 1078, 1086 (9th Cir. 1998), *cert. denied*, 525 U.S. 1016 (1998) (no qualified immunity where disputed questions of fact suggested defendant-officer shot the decedent-officer "in conditions in which he should have been able to recognize that the figure he was shooting was a fellow officer."). It would have been clear to a reasonable officer that Petitioners' conduct was unlawful in the situation Petitioners confronted.

(Cont'd)

Consideration of the "totality of the circumstances" also requires officers to investigate or seek further information in some situations. *Curley v. Klem*, 298 F.3d 271, 281 (3d Cir. 2002) (no qualified immunity for officer who mistakenly shot another officer without first taking time to learn and assess more facts).

9. In fact, this Court set a standard for deadly force that does not require "split-second evaluations of unknowable facts." *Garner*, 471 U.S. at 19.

10. In *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002), this Court held any requirement that facts of previous cases be "materially similar" to the case at issue is a "rigid gloss on the qualified immunity standard" that is "not consistent with our cases." *Hope*, 536 U.S. at 739. Prior cases need not be "fundamentally similar" to the case at issue either. 536 U.S. at 740. The "salient question" is whether the state of the law at the time of the events in question gave Petitioners "fair warning" that their alleged conduct was unconstitutional. *Id.*

The Court of Appeals below concluded, "If resolved in favor of the Wilkinses, these issues of material fact would support a finding that Scarrott and Koponen violated Wilkins' ***clearly established*** Fourth Amendment right to be free from unreasonable seizure by excessive force." 350 F.3d at 956 (emphasis added). In so holding, the Court of Appeals applied this Court's definition of the term 'clearly established:' "'clearly established' means that 'it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*'" 350 F.3d at 954, *citing Saucier*, 533 U.S. at 202 (emphasis in Court of Appeals opinion).

In this unique case, where it is uncontested that Petitioners' use of deadly force against a fellow officer was mistaken but ultimately unauthorized – in circumstances where reasonable officers would have known that the situation they were confronting was another officer arresting the suspect they had been pursuing, or at least where reasonable officers would have made a reasonable attempt to investigate or seek further information before shooting – both the District Court and the Court of Appeals properly determined that Petitioners are not entitled to qualified immunity from trial.

B. The Court of Appeals Decision in this Case Is Not in Conflict with the Decision of Any Other United States Court of Appeals on the Same Important Matter

Petitioners loosely describe a number of disparate qualified immunity decisions from other circuits of the United States Court of Appeals, and contend that the present case is illustrative of a "conflict." Petitioners have not demonstrated any such conflict, nor even that the present decision of the Ninth Circuit Court of Appeals is incorrect.

The level of generality with which Petitioners address those other decisions makes meaningful comparison impossible. However, the other decisions Petitioners raise deal with diverse factual situations and claims, and do not address Fourth Amendment claims arising from 'friendly fire' police shootings like the present case.

Fortunately, 'friendly fire' police misconduct cases are infrequent in the Court of Appeals. But two other such cases resulted in the same denial of qualified immunity to the shooting officers as in the present case. *Jensen v. City of Oxnard*, 145 F.3d 1078, 1086 (9th Cir. 1998), *cert. denied*, 525 U.S. 1016 (1998) (police officer not entitled to qualified immunity where he shot a fellow officer "in conditions in which he should have been able to recognize that the figure he was shooting was a fellow officer"); *Curley v. Klem*, 298 F.3d 271, 281 (3d Cir. 2002) (no qualified immunity for officer who mistakenly shot another officer without taking time to learn and assess more facts).

In their criticism of courts' decisions to leave the resolution of material questions of fact for the jury, it appears that Petitioners would seek to reverse the long-established rule that at summary judgment, and when considering the affirmative defense of qualified immunity, all facts and reasonable inferences therefrom must be considered in the light most favorable to the non-moving party.

Petitioners urge the adoption of a qualified immunity standard that would resolve factual disputes before trial in favor of defendant officers, and that would accept defendants' self-serving, post-hoc, subjective excuses for their violation of Constitutional rights as the basis for granting qualified immunity. This Court has never suggested the imposition of such a lopsided and unfair hurdle for those whose

Constitutional rights may have been violated. The "salient question" is whether the state of the law at the time of the events in question gave Petitioners "fair warning" that their alleged conduct was unconstitutional. *Hope*, 536 U.S. at 740.

Petitioners have not demonstrated any conflict between the circuits of the United States Court of Appeals on this matter. The Court of Appeals below correctly decided to affirm the District Court's denial of qualified immunity in this hotly disputed, tragic case.

CONCLUSION

For these reasons, Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari.

Respectfully Submitted,

MICHAEL J. HADDAD
Counsel of Record
JULIA SHERWIN
HADDAD & SHERWIN
505 Seventeenth Street
Oakland, CA 94612
(510) 452-5500

JOHNNIE L. COCHRAN, JR.
BRIAN T. DUNN
COCHRAN, CHERRY, GIVENS,
SMITH & STEWART
4929 Wilshire Boulevard
Suite 1010
Los Angeles, CA 90010

Counsel for Respondents

COPY

Supreme Court, U.S.
FILED
JUN 9 - 2004
OFFICE OF THE CLERK

NO. 03-1517

IN THE SUPREME COURT OF THE UNITED STATES

TIM SCARROT and ANDREW KOPONEN, *Petitioners,*

v.

KELY WILKINS, et al., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN SUPPORT OF PETITIONERS OF AMICUS CURIAE THE CALIFORNIA ATTORNEY GENERAL ON BEHALF OF THE STATE OF CALIFORNIA

BILL LOCKYER
Attorney General of the State of California
MANUEL MEDEIROS
State Solicitor General
TAYLOR CAREY
Acting Chief Assistant Attorney General
JAMES SCHIAVENZA
Senior Assistant Attorney General
PAUL HAMMERNESS, SBN 090294
Supervising Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5520
Facsimile: (415) 703-5480

TABLE OF CONTENTS

Page

INTEREST OF THE ATTORNEY GENERAL OF CALIFORNIA 1

REASONS FOR GRANTING THE WRIT 2

I. THE NINTH CIRCUIT'S MISAPPLICATION OF SAUCIER UNDERMINES THE STRONG INTEREST OF PEACE OFFICERS IN HAVING ISSUES OF QUALIFIED IMMUNITY RESOLVED AS A MATTER OF LAW WELL BEFORE TRIAL 2

A. The Court of Appeals' Focus on Factual Disputes as to the Reasonableness of Force Improperly Failed to Focus on the Legal Issue as to Whether the Use of Force Could Be Deemed Reasonable. 2

B. The Ninth Circuit's Approach Improperly Delegates The Determination of Qualified Immunity to Juries. 4

C. The Net Effect of the Ninth Circuit's Flawed Analysis is to Force Many Excessive Force Cases to Trial in Derogation of the Immunity's Purpose. 7

D. Negligence Actions should be Tried in State Courts, Not in Federal Courts as Disguised § 1983 Actions. 10

TABLE OF CONTENTS (Cont'd.)

Page

E. The Ninth Circuit Employed a Definition of Clearly Established Law at a Level of Generality which Effectively Precluded Immunity. 11

II. THE NINTH CIRCUIT'S OPINION HIGHLIGHTS THE SPLIT IN THE CIRCUITS REGARDING THE PROPER PROCEDURE TO BE UTILIZED IN MAKING THE ULTIMATE IMMUNITY DETERMINATION 14

A. The Circuits are Divided with Respect to the Correct Roles of Judge and Jury in Deciding the Issue of Objective Reasonableness. 14

B. Peace Officers Need the Protection of Clear and Consistent Guidelines in the Caselaw of Immunity in Deadly Force Cases. 16

CONCLUSION 17

TABLE OF AUTHORITIES

Cases: **Page**

Acri v. Varian Assocs.,
114 F.3d 999 (9th Cir. 1997) 5

Anderson v. Creighton,
483 U.S. 635, 659 (1987) 14

Bell v. Irwin,
321 F.2d 637, 640 (7th Cir. 2003) 11

Berry v. City of Detroit,
25 F.3d 1342, 1352 (6th Cir. 1994) 5

Billington v. City of Boise,
292 F.3d 1177 (9th Cir. 2002) 16

Billington v. Smith,
292 F.3d 1177, 1190 (9th Cir. 2002) 11

Boyd v. Baeppler,
215 F.3d 594, 602-04 (6th Cir. 2000) 5

Brower v. County of Inyo,
489 U.S. 593, 596 (1989) 11

Cottrell v. Caldwell,
85 F.3d 1480, 1491 (11th Cir. 1996) 5, 15

Curley v. Klem,
298 F.3d 271, 278-79 (3rd Cir. 2002) 15

Drewitt v. Pratt,
999 F.2d 774, 777, 780 (4th Cir. 1993) 7

TABLE OF AUTHORITIES (Cont'd.)

Cases: **Page**

Fisher v. City of Memphis,
234 F.3d 312, 317 (6th Cir. 2000) 15

Gibson v. Rich,
44 F.3d 274, 277 n.7 (5th Cir. 1995) 7

Graham v. Connor,
490 U.S. 386, 396 (1989) passim

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 10, 17

Hunter v. Bryant,
502 U.S. 224 (1991) passim

King v. Beavers,
148 F.3d 1031, 1036 (8th Cir. 1998) 5

Malley v. Briggs,
475 U.S. 335, 341 (1986) 4

Maltby v. Winston,
36 F.3d 548, 564 (7th Cir. 1994) 5

Marquez v. Gutierrez,
322 F.3d 689, 691 (9th Cir. 2003) 16

Oliveira v. Mayer,
23 F.3d 642, 650 (2nd Cir. 1994) 15

TABLE OF AUTHORITIES (Cont'd.)

Cases:	Page
Olsen v. Layton Hills Mall, 312 F.3d 1304 (10th Cir. 2002)	15
Ortega v. O'Connor, 146 F.3d 1149, 1156 (9th Cir. 1998)	15
Paul v. Davis, 424 U.S. 693, 701 (1976)	10
Reynolds v. County of San Diego, 84 F.3d 1162, 1170 (9th Cir. 1996)	5
Rivas v. City of Passaic, 365 F.3d 181 (3rd Cir. 2004)	15
Roy v. Inhabitants of the City of Lewiston, 42 F.3d 691, 695 (1st Cir. 1994)	5
Saucier v. Katz, 533 U.S. 194 (2001)	passim
Swain v. Spinney, 117 F.3d 1, 10 (1st Cir. 1997)	15
Valance v. Wisel, 110 F.3d 1269, 1276 (7th Cir. 1997)	7
Warlick v. Cross, 969 F.2d 303, 305 (7th Cir. 1992)	15

TABLE OF AUTHORITIES (Cont'd.)

	Page
Cases:	
Wilkins v. City of Oakland, 350 F.3d 949, 956 (9th Cir. 2003)	8
Wilson v. City of Des Moines, 293 F.3d 447 (8th Cir. 2002)	15
Wood v. City of Lakeland, Fl., 203 F.3d 1288, 1291-93 (11th Cir. 2000)	7
Constitutional Provisions:	
Cal. Const., Art. V, § 13	1

IN THE SUPREME COURT OF THE UNITED STATES

No. 04-_____

TIM SCARROT and ANDREW KOPONEN, *Petitioners,*

v.

KELY WILKINS, et al., *Respondents.*

INTEREST OF THE ATTORNEY GENERAL OF CALIFORNIA

The California Attorney General, as the chief law enforcement officer of the State of California, writes in support of petitioner-officers to urge this Court to grant the writ. This case raises important issues concerning the law of qualified immunity and particularly, the correct approach for determining whether factual disputes concerning the legality of the use of deadly force by police under the Fourth Amendment will preclude the officers entitlement to qualified immunity.

As the designated chief law officer of California (Cal. Const., Art. V, § 13), the Attorney General has a clear duty to see that all law enforcement officers are able to vigorously enforce the laws and make difficult, often split-second decisions about when to employ deadly force without the fear that their decisions, if constitutionally reasonable, will nonetheless be subjected to unnecessary and burdensome scrutiny before a jury at trial.

The California Attorney General represents many state law enforcement agencies and officials in civil rights and tort

litigation in federal and state courts, including the California Highway Patrol, the largest law enforcement agency in California. The California Attorney General also represents in litigation agents of the California Department of Justice Bureau of Narcotics Enforcement and Bureau of Investigation. Thus, the Attorney General has an important stake in ensuring that the federal civil rights laws applicable to peace officers in California are faithfully and correctly applied.

The Attorney General is uniquely situated by virtue of these duties and responsibilities to address the key issues in this case, which concern the appropriate balance to be struck in applying Fourth Amendment standards regarding the use of deadly force, in the context of qualified immunity.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S MISAPPLICATION OF *SAUCIER* UNDERMINES THE STRONG INTEREST OF PEACE OFFICERS IN HAVING ISSUES OF QUALIFIED IMMUNITY RESOLVED AS A MATTER OF LAW WELL BEFORE TRIAL

A. The Court of Appeals' Focus on Factual Disputes as to the Reasonableness of Force Failed to Focus on the Legal Issue as to Whether the Use of Force Could Be Deemed Reasonable.

The law enforcement community has a strong and abiding interest in the courts' clear and consistent guidance in the caselaw regarding the proper use of deadly force. In acting to secure the community and to prevent crime, it is essential for the personal safety of the officers and the community that when officers encounter armed and apparently dangerous individuals,

they are able to act decisively and without hesitation. The use of deadly force under the Fourth Amendment thus incorporates the concept that reasonable officers in emergency situation might mistakenly use more force than is necessary, or use force that appears to be necessary, but actually is not required. Under this Court's qualified immunity jurisprudence which culminated in *Saucier v. Katz*, 533 U.S. 194 (2001), so long as an officer's use of force is within a range of reasonable options, immunity will attach despite the fact that other reasonable officers, with the benefit of 20/20 hindsight, might disagree with the conclusion that deadly force was required. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (use of force to be judged "from the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight . . . ."). Indeed, as the Court opined in *Saucier v. Katz*, *supra*, 533 U.S.: "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed."

It was clear in this tragic case that officers Scarrot and Koponen did not know that the man they shot was an undercover officer, nor is there a scintilla of evidence in the record that either officer acted in bad faith when they opened fire to prevent what they thought was an impending murder. Under the circumstances of this case, it cannot be said that they knowingly violated the law. Contrary to the decision of the Ninth Circuit, the fact that other police officers or police "experts" could later disagree as to whether or not deadly force was justified, with the benefit of perfect hindsight knowledge, should not operate to deprive the officers of qualified immunity or force them to face a trial where the officers made a decision that was clearly within the range of constitutionally reasonable alternatives.

The California Attorney General believes that the Ninth Circuit badly misconstrued this Court's precedent in *Saucier v. Katz*. Under this Court's qualified immunity jurisprudence, the fact that officers of reasonable competence could disagree as to

the necessity for the use of deadly force does not mean that a jury trial is needed to resolve the different views. Rather, if "officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Under *Saucier*, only if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," should immunity not apply. *Saucier*, 533 U.S. at 202.

B. The Ninth Circuit's Approach Improperly Delegates The Determination of Qualified Immunity to Juries.

With the Ninth Circuit's confused approach, the existence of factual disputes as to the underlying reasonableness of an officer's use of force forecloses the mandatory legal inquiry into the objective reasonableness of the officer's conduct. This, in turn, results in a wholesale denial of qualified immunity at any stage in proceedings short of trial by jury. The Ninth Circuit's approach is fundamentally at odds with the admonition of this Court in *Saucier* and its earlier decision in *Hunter v. Bryant*, 502 U.S. 224 (1991). In *Hunter v. Bryant*, the Court stressed that the issue of immunity should not be placed "routinely" in the hands of the jury, but "ordinarily should be decided by the court long before trial." 502 U.S.at 228. Moreover, the Ninth Circuit's analysis ignores the essential question mandated by *Saucier* and it predecessors: "the court should ask whether the [officers] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed [years] after the fact." *Id.*

The analysis employed by the Ninth Circuit in this case is clearly in conflict with this Court's precedents as to the proper approach to determining the issue of qualified immunity. A dispute in the opinions of police officers or between police practices experts as to the proper force to be utilized in a

situation should not preclude the application of immunity, where the use of force is justified, even if subsequently shown to be mistaken. *See Boyd v. Baeppler*, 215 F.3d 594, 602-04 (6th Cir. 2000) (police entitled to summary judgment in shooting case despite expert testimony a suspect's gunshot wounds made it improbable that he could have raised himself off the ground to again threaten the police before being fatally shot); *King v. Beavers*, 148 F.3d 1031, 1036 (8th Cir. 1998) (expert's opinion the police behaved unreasonably in acting outside their territorial jurisdiction was irrelevant to the issue of whether the challenged conduct violated the plaintiff's constitutional rights); *Cottrell v. Caldwell*, 85 F.3d 1480, 1491 (11th Cir. 1996) (in order to hold the police liable under section 1983 for an in-custody death the plaintiff must produce a great deal more evidence than expert testimony that the police violated "generally accepted police customs and practices"); *Reynolds v. County of San Diego*, 84 F.3d 1162, 1170 (9th Cir. 1996), overruled in part by *Acri v. Varian Assocs.*, 114 F.3d 999 (9th Cir. 1997) (police entitled to summary judgment in shooting case despite expert testimony they violated proper police procedures since "the fact that an expert disagrees with an officer's action does not render the officer's actions unreasonable"); *Roy v. Inhabitants of the City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994) (an expert's belief an officer could have done a better job and avoided the need to shoot is not determinative where the officer's actions were neither "plainly incompetent" nor "clearly proscribed"); *Maltby v. Winston*, 36 F.3d 548, 564 (7th Cir. 1994) (court excluded plaintiff's expert on general police procedure as incompetent to testify on undercover drug operations); *Berry v. City of Detroit*, 25 F.3d 1342, 1352 (6th Cir. 1994) (rejecting the notion that there exists a "field" of expertise in the non-specific area of "police policies and practices").

It should not be enough to defeat qualified immunity simply to argue that under one interpretation of the facts, an officer's use of force could be deemed objectively unreasonable.

Reconsideration of an event will almost always, as here, reveal that an officer could have done something differently if he had known the future before it occurred. Should the Ninth Circuit's approach stand, however, with its focus on hindsight second-guessing and undue deference to fact finding by a jury, as opposed to a judge, the essential benefits of the immunity will be forever lost. "Because qualified immunity protects government officials from suit as well as from liability, it is essential that qualified immunity claims be resolved at the earliest possible stage of litigation." *Hunter v. Bryant, supra*, 502 U.S. at 233-34. To defeat qualified immunity, a party must do more than simply argue that under one interpretation of the facts — the officer's use of force could be deemed objectively unreasonable.

Indeed, in *Saucier*, this Court emphasized these weighty policy underpinnings of qualified immunity mandate a two-step inquiry well in advance of trial.

> "In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence. Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.' [citation]. The privilege is 'an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.' [citation] As a result, 'we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'"

533 U.S. at 200.

After *Saucier*, courts cannot simply stop with a determination that a triable issue of fact exists as to whether an officer acted unconstitutionally. Instead, the qualified immunity inquiry is separate from the constitutional inquiry and thus an officer's claim of qualified immunity should not be defeated simply because a triable issue of fact exists as to whether the decision to shoot was mistaken. *Valance v. Wisel*, 110 F.3d 1269, 1276 (7th Cir. 1997) (plaintiff's testimony he did not "believe" he had committed the charged offense was insufficient to defeat summary judgment). *See* also *Wood v. City of Lakeland, Fl.*, 203 F.3d 1288, 1291-93 (11th Cir. 2000) (police entitled to summary judgment for fatally shooting person threatening suicide with a knife despite the fact that the autopsy report disputed the officers' claim the decedent was holding the knife in a threatening manner when shot); *Gibson v. Rich*, 44 F.3d 274, 277 n.7 (5th Cir. 1995) (police entitled to summary judgment for arresting plaintiff for public intoxication despite alleged factual dispute over whether plaintiff was actually drunk); *Drewitt v. Pratt*, 999 F.2d 774, 777, 780 (4th Cir. 1993) (officer entitled to summary judgment for shooting motorist despite alleged factual dispute over whether the officer could have jumped out of the car's path and therefore avoided the need to shoot).

C. The Net Effect of the Ninth Circuit's Flawed Analysis is to Force Many Excessive Force Cases to Trial in Derogation of the Immunity's Purpose.

The Ninth Circuit's error here mirrors a mistaken approach which this Court corrected in its earlier summary reversal of the Ninth Circuit in *Hunter v. Bryant*, 502 U.S. 224 (1991). In reversing the Ninth Circuit's denial of qualified immunity in the earlier Fourth Amendment false arrest case, this

Court noted in its opinion:

> "The decision of the Ninth Circuit ignores the import of these [qualified immunity] decisions. The Court of Appeals' confusion is evident from its statement that '[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment . . . based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach.' [citation] This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial. [citation] Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable interpretation of the events can be constructed five years after the fact."

502 U.S. at 227-28.

The error and confusion of the *Wilkins* panel in the instant case was highlighted by its quotation from Justice Ginsburg's concurring opinion in *Saucier*. *Wilkins v. City of Oakland*, 350 F.3d at 949, 956 (9th Cir. 2003). This reliance on the *Saucier* concurrence is misplaced, for Justice Ginsburg's concurring opinion ultimately disagreed with the majority's view that qualified immunity involved a two-step analysis. Contrary to the majority, Justice Ginsburg stated:

> "[A]n officer who uses forces that is objectively reasonable in light of the facts and circumstance confronting [him]simultaneously meets the

> standard for qualified immunity . . . and the standard the Court set in *Graham* for a decision on the merits in his favor. Conversely, an officer whose conduct is objectively unreasonable under *Graham* should find no shelter under a sequential qualified immunity test."

Saucier, supra, 533 U.S.. at 214 (citations omitted) (Ginsburg, J., concurring).

As Justice Ginsburg reasoned further, "[o]nce it has been determined that an officer violated the Fourth Amendment by using 'objectively unreasonable' force as that term is explained in *Graham v. Connor*, there is simply no work for a qualified immunity inquiry to do."

Id. at 216-17.

In this sense, the *Wilkins* opinion expresses the minority view of the dissenters in *Saucier*, and is deserving of reversal, because it would preclude the application of the qualified immunity defense to police officers in many, if not most, arrest cases (not just in shooting incidents) where factual disputes can almost always be created to raise questions concerning the reasonableness of the officers' conduct. After *Saucier*, however, a claim of immunity must be upheld unless, at the time of the asserted violation, settled law clearly proscribed the officers' actions. Put another way, *Saucier* should allow for qualified immunity where the circumstances show that an officer made a constitutionally reasonable judgment based on a factual misperception.

D. Negligence Actions should be Tried in State Courts, Not in Federal Courts as Disguised § 1983 Actions.

Another undesirable consequence of the Ninth Circuit's erroneous analysis in this case is the resultant need for trial in federal court of a case which should properly be addressed only in state court as a negligence case. Indeed, the deferential approach embodied in this Court's qualified immunity jurisprudence serves to winnow out cases which only involve, police mistakes, which do not involve issues of constitutional import.

When enough material facts are undisputed to justify an officer's conduct objectively for purposes of the qualified immunity analysis, then there is nothing for a jury to do except second-guess the officer, which the federal courts have been loathe to do since this Court's opinion in *Graham v. Connor*. If this Court's deadly force and qualified immunity rulings since *Graham* and *Harlow* stand for anything, it is the proposition that constitutional tort litigation does not equate to common law tort litigation, in which negligence is a matter of degree to be resolved by a jury, provided a plausible argument may be made for the view that the defendant officer was negligent.

This Court has repeatedly cautioned that although section 1983 creates a species of tort liability, it is not designed or intended by Congress to serve as a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976). But, permitting a jury the freedom to determine for itself whether particular conduct was ultimately reasonable within the meaning of the Fourth Amendment would introduce precisely the kind of *ex post* reassessment that *Graham, Harlow, Hunter* and *Saucier* decried.

Under the Constitution, the correct question is how things appeared to objectively reasonable officers at the time of the events, not how they appear in the courtroom to a cross-

section of the civilian community.

Judges, rather than juries, determine what limits the Constitution places on official conduct. Although the Ninth Circuit treated the reasonableness of the police officers' conduct in this case in a manner indistinguishable from the treatment of negligence in an ordinary tort suit, it does not pass muster and must be reviewed and reversed. To say that police officers have acted within the bounds of the Constitution is not to say that they have acted wisely, but that issue is left properly to resolution by the States. *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) ("In sum, the Fourth Amendment addresses 'misuse of power'[citation] not the accidental effects of otherwise lawful government conduct."); *Bell v. Irwin*, 321 F.3d 637, 640 (7th Cir. 2003) (rejecting treatment of section 1983 excessive force case as state law negligence case); *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002) (negligent police conduct not actionable under Fourth Amendment).

E. The Ninth Circuit Employed a Definition of Clearly Established Law at a Level of Generality which Effectively Precluded Immunity.

Despite its protestations to the contrary, the Ninth Circuit's ruling cannot be squared with *Saucier*, because it omitted the second step of the *Saucier* analysis: determining whether, even assuming that the officers' mistake regarding the use of force violated the Fourth Amendment, the mistake was nonetheless not so unreasonable such that no reasonable officer could conclude that the shooting was unjustified. However, by defining clearly-established law to be an absolute proscription against "the use of deadly force against a fellow police officer," the lower court's opinion left no room for an reexamination of the officers' use of force, in the context of the facts of the case, to determine whether the deadly force could be justifiable. *Wilkins, supra*, 350 F.3d at 955.

The error in the ruling was inherent in the Ninth Circuit's definition of what constituted clearly-established law - defining it within a level of generality which effectively precluded immunity in many cases where an underlying constitution violation could be found.

> "It is undisputed - - and the officers do not contest - that the Fourth Amendment bars the use of deadly force against a fellow police officer effecting an arrest, and that there could be reasonable mistake about this prohibition. Indeed, in *Jensen v. City of Oxnard*, 145 F.2d 1078 (9th Cir.), *cert. denied*, 525 U.S. 1016 (1998), we held that 'it was clearly-established that police officers retain their Fourth Amendment rights,' 145 F.3d at 1085, and obvious from common sense that the decedent police officer in that case 'had the right to be free from an unreasonable seizure even from a fellow officer in the course of police work."

Wilkins, supra, 350 F.3d at 955, quoting *Jensen, supra*, 145 F.3d at 1086.

This generalized definition of "clearly-established" law employed by the Ninth Circuit directly conflicts with this Court's admonition in *Saucier* against the use of abstract definitions of the law for determining whether qualified immunity can be applied.

> "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential

> step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable."

Saucier, supra, 533 U.S. at 201.

This Court mandated in *Saucier* that the inquiry with respect to clearly-established law in step two of the qualified immunity test be fact-specific, rather than in terms of abstract propositions of the law.

> "'The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' [citation] The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."

Id. at 202.

In the context of excessive force claims, the Court explained:

> "Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes 'hazy border between excessive and acceptable force' *Priester v. City of Riviera Beach*, 208 F.3d 919, 926-927 (CA 11 2000), and to ensure that before they are subjected to

> suit, officers are on notice their conduct is unlawful."

Saucier, supra, 533 U.S. at 206.

Contrary to the view of the Ninth Circuit, there is no absolute constitutional right protecting against police mistakes regarding the necessity for the use of force. By defining clearly-established law as a proscription against the use of deadly force against a fellow officer, the lower court erroneously foreclosed any inquiry into the legal reasonableness of the use of force under the circumstances of this case. As this Court has repeatedly made clear, the crucial inquiry cannot be at such a high level of generality that the qualified immunity analysis "bear[s] no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

The question here was not whether respondent's decedent enjoyed a right to be free from excessive force. Rather, the issue for purposes of qualified immunity, is whether, "in the light of pre-existing law the unlawfulness [of the officers' specific actions was] apparent." *Id.*

II.

THE NINTH CIRCUIT'S OPINION HIGHLIGHTS THE SPLIT IN THE CIRCUITS REGARDING THE PROPER PROCEDURE TO BE UTILIZED IN MAKING THE ULTIMATE IMMUNITY DETERMINATION

A. The Circuits are Divided with Respect to the Correct Roles of Judge and Jury in Deciding the Issue of Objective Reasonableness.

The lower court's undue deference in this case to jury resolution of the qualified immunity issue reflects a split in the

circuit courts as to the proper procedure to decide the immunity issue when it is claimed that disputed issues of fact exist to preclude resolution on summary judgment. Even before *Saucier*, a number of circuits, including the Ninth Circuit, had endorsed an approach that permits a jury to evaluate the objective reasonableness of a defendant official's conduct once it had been decided that the participation of a jury was necessary for the resolution of factual issues. *Fisher v. City of Memphis*, 234 F.3d 312, 317 (6th Cir. 2000) (jury to consider issue of objective reasonableness in deadly force case); *Ortega v. O'Connor*, 146 F.3d 1149, 1156 (9th Cir. 1998) (issue of objective reasonableness submitted to jury); *Oliveira v. Mayer*, 23 F.3d 642, 650 (2nd Cir. 1994) (holding that district court should have let jury decide issue of objective reasonableness).

Other circuit courts of appeal, in line with *Hunter v. Bryant*, determined that even if it was claimed that disputed facts precluded summary judgment, the judge was required to decide the ultimate immunity question. *Curley v. Klem*, 298 F.3d 271, 278-79 (3rd Cir. 2002) (noting the split in the circuits and holding that the judge should ultimately decide the qualified immunity issue); *Swain v. Spinney*, 117 F.3d 1, 10 (1st Cir. 1997) (judge is to decide the issue of immunity); *Cottrell v. Caldwell*, 85 F.3d 1480, 1488 (11th Cir. 1996); *Warlick v. Cross*, 969 F.2d 303, 305 (7th Cir. 1992).

As argued in the petition for certiorari after *Saucier, some* panels in Ninth Circuit have collapsed the two-step qualified immunity test into a single determination of Fourth Amendment reasonableness, thus effectively precluding room for a separate determination of "arguable" objective reasonableness. (Cert. Pet., at pp. 17-20). *Rivas v. City of Passaic*, 365 F.3d 181 (3rd Cir. 2004) (once issues of fact found with respect to claimed Fourth Amendment excessive force violation, it was for jury to resolve the issue whether use of force was objectively reasonable): *Olsen v. Layton Hills Mall*, 312 F.3d 1304 (10th Cir. 2002) (ruling that summary judgment cannot be granted on qualified immunity grounds if there are

factual disputes as to existence of constitutional violation); *Wilson v. City of Des Moines*, 293 F.3d 447 (8th Cir. 2002) (apparently requiring officer to conclusively establish reasonableness of use of force to obtain qualified immunity).

Curiously, another panel of the Ninth Circuit prior to *Wilkins* correctly applied *Saucier* to reverse the district court's denial of qualified immunity in a Fourth Amendment deadly force case in the face of a factual dispute concerning the reasonableness of the tactics used. *Billington v. City of Boise*, 292 F.3d 1177 (9th Cir. 2002) (dicta); *see also Marquez v. Gutierrez*, 322 F.3d 689, 691 (9th Cir. 2003) (Eighth Amendment prison case involving mistake of fact in use of deadly force).

B. Peace Officers Need the Protection of Clear and Consistent Guidelines in the Caselaw of Immunity in Deadly Force Cases.

As this Court recognized in *Graham v. Connor*, the proper analysis for any police use of force - deadly or non-deadly - places the focus on the objective reasonableness of the force at the moment it is used. 490 U.S. 386, 396 (1989) (decrying the "20/20 vision of hindsight"). The tragic facts of the instant case reflects that most shootings take place at close range, in confused circumstances, and occur within a matter of seconds. Therefore, in a shooting case, the proper inquiry should focus on the circumstances facing the officers at the time the shooting decision is made, considering only the facts known to the officers at the time of the decision.

Graham provides only a general framework for assessing whether a particular use of force is legal under the Fourth Amendment, operating through a balancing test: "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."

Graham, supra, 490 U.S. at 397. This is the question normally answered by juries in police excessive force cases.

Saucier recognized that although relevant to the qualified immunity inquiry, the *Graham* standard is too abstract to provide the clear legal standard required to fulfill the purposes of immunity delineated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In this instant case, the Ninth Circuit terminated the qualified immunity analysis because of the claimed existence of disputed facts with respect to the underlying violation and consequently foreclosed the inquiry into whether an officer in the case could have believed his use of deadly force was lawful.

In this case, the appropriate question was whether reasonable officers in the position of officers Scarrot and Koponen could have believed that the level of force they used was lawful in light of clearly-established law and the information they possessed. The correct question was not whether other officers or later acquired police practices experts could disagree with the lawfulness of petitioners' use of deadly force. The Court of Appeals failed to answer the correct question, and in so doing, erred.

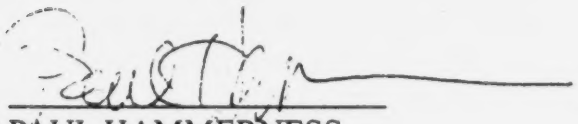
CONCLUSION

For the foregoing reasons, the California Attorney General believes that the writ of certiorari should be granted.

Dated: July 8, 2004.

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California
MANUEL MEDEIROS
State Solicitor General
TAYLOR CAREY
Acting Chief Assistant Attorney General
JAMES SCHIAVENZA
Senior Assistant Attorney General



PAUL HAMMERNESS
Supervising Deputy Attorney General
Counsel of Record

No. 04-____

IN THE

SUPREME COURT OF THE UNITED STATES

TIM SCARROT and ANDREW KOPONEN, *Petitioners*

v.

KELY WILKINS, et al., *Respondents*

- - - - - - - - - -

CERTIFICATE OF SERVICE BY MAIL

I , Paul T. Hammerness, a member of the Bar of this Court hereby certify that on July 9, 2004, three copies of the **Brief in Support of Petitioners of Amicus Curaie the California Attorney General on Behalf of the State of California** in the above-entitled case were mailed, first class postage prepaid, to

John A. Russo
Randolph W. Hall
William E. Simmons
City of Oakland
One Frank H. Ogawa Plaza
6th Floor
Oakland, CA 94612
(510) 239-3751
Counsel for Petitioners

Todd Boley
Counsel of Record
Henry S. Hewitt
Mark L. Mosley
Erickson, Beasley, Hewitt & Wilson LLP
483 Ninth Street, Suite 200
Oakland, CA 94607
(510) 839-3448
Counsel for Petitioners

U.S. Court of Appeals 9th Circuit
Attn: Honorable Cathy A. Catterson,
Clerk
95 Seventh Street
San Francisco, CA 94103-1526

Johnnie L. Cochran, Jr. SBN 33334
Brian T. Dunn, SBN 176502
Cochran, Cherry, Givens, Smith & Stewart
4929 Wilshire Blvd., Suite 1010
Los Angeles, CA 90010-3856
Telephone: (323) 931-6200
Facsimile: (323) 931-9521
Counsel for Respondents

Michael J. Haddad, SBN 189114
Julia Sherwin, SBN 189268
Haddad & Sherwin
1300 Clay Street, Suite 600
Oakland, CA 94612
Telephone: (510) 622-7788
Facsimile: (510) 482-3873
Counsel for Respondents

I further certify that all parties required to be served have been served.

PAUL T. HAMMERNESS
Supervising Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
(Tel:(415) 703-5520)
Counsel of Record